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NO. _____

Supreme Court of the United States

October Term, 1986

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida, Petitioners,

v.

AUBREY DENNIS ADAMS, JR., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit Court of Appeals is in direct and irreconcilable conflict with the Florida Supreme Court and the Fifth Circuit Court of Appeals regarding the opinion of this Court in Caldwell v. Mississippi, and, thereby, deprived similarly situated classes involved in death penalty litigation of a consistent standard of federal review?

2. Whether the Court of Appeals has misapplied Reed v. Ross, 468 U.S. 1 (1984) to justify its review of a procedurally barred claim or whether that decision should be overruled or limited so as to avoid turning each new decision emanating from this Court into cause and prejudice for ignoring an otherwise valid procedural bar?

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

The petitioners, Richard L. Dugger and Robert A. Butterworth, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on November 13, 1986. A revised opinion was entered on petition for rehearing on April 23, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals, Eleventh Circuit is reported at 804 F.2d 1526 (11th Cir. 1986), and is reprinted in the appendix hereto, p. 1a, infra.

The revised opinion of the Court of Appeals, Eleventh Circuit is reported at 816 F.2d 1493 (11th Cir. 1987), and is reprinted in the appendix hereto, p. 78a, infra.

The decision of the United States District Court for the Middle District of Florida is not yet reported. It is reprinted in the appendix hereto, p. 43a infra.

The decision of the Supreme Court of Florida relevant to the issues herein is reported at 484 So.2d 1216 (Fla. 1986).

JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered on November 13, 1986. Rehearing was denied on April 23, 1987. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV of the Constitution of the United States provides, inter alia, that:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment VIII provides that:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment X provides that:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States repectively, or to the people.

STATEMENT OF THE CASE

Aubrey Dennis Adams was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley. Following the jury's recommendation , the trial judge imposed the death sentence in January 1979.[1]

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[1] The particular facts of the crime, though not relevant to this proceeding at this time, can be found in more detail in Adams v. State, 412 So.2d 850 (Fla. 1982) and Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985).

At the beginning of jury selection for Adams' trial, the judge, who is the sentencer, instructed the initial panel of prospective jurors regarding the nature and effect of the jury's recommended sentence in a capital murder trial. He informed them of the advisory nature of their sentencing recommendation, the fact that he could disregard it and sentence Adams to life or death, and that the decision is on his conscience (pp. 4a-5a, infra). He gave a substantially similar explanation of the jury's role each time new prospective jurors were seated (p. 5a; 35a, infra). Each time this explanation was given, however, it was preceded by an explanation that their advisory sentencing verdict was to be based on the finding and weighing of aggravating and mitigating factors (p. 39a, infra). When two prospective jurors indicated that their opposition to the

death penalty would keep them from recommending a death sentence he probed the strength of their convictions, without objection, in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it." (p. 40a, infra).

During the penalty phase the jury was properly instructed under Florida law as to the fact that their sentencing recommendation is only advisory and that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." (p. 39a, infra). Fla. Std. Jury Instr. (Crim.) 2.09. The jury was properly instructed as to the finding and weighing of the mitigating and aggravating circumstances and its duty to follow the law in rendering an advisory sentence and that the verdict should be based upon the evidence. It

was further instructed not to "act hastily or without due regard to the gravity of these proceedings" and told to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake." (p. 39a, infra). In final closing argument, the prosecutor acknowledged that the jury's recommendation was advisory and admonished the jurors to be fair and impartial to the defendant and also to the people of the State of Florida and that "any way you people decide will satisfy the State of Florida" (Tr. Sentencing, p. 1476).

No objection to such comments was interposed during voir dire. Defense counsel was satisfied with the formal jury instruction at the penalty phase and never requested an alternate or more comprehensive instruction. The propriety of the judge's remarks was never raised as an issue on direct appeal (p. 13a;

37a, infra). Adams collaterally challenged his judgment and sentence in state and federal courts upon the signing of a death warrant, never raising this issue, and all relief was denied. Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985). Two days prior to his second scheduled execution, Adams, for the first time, raised the issue that the trial judge's remarks violated the precepts of Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), in a second motion to vacate judgment and sentence, which was denied by the trial court on March 3, 1986. The Florida Supreme Court affirmed this denial finding that all newly raised grounds for relief should have been presented on direct appeal or in the first motion to vacate judgment and sentence and were barred from review as an abuse of procedure and by caselaw.

Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986). The court expressly and solely relied on the bar raised by state procedural barriers and never reached the merits of the claim. This Court denied his petition for writ of certiorari. Adams v. Florida, 106 S.Ct. 1506 (1986).

Adams then filed a second habeas petition on March 5, 1986. The district court did not reach the merits of the claim, finding the failure to raise it in the first petition was an abuse of the writ, and that the claim also had been procedurally defaulted in the state courts (pp. 57a-60a, infra). Counsel offered as justification for not raising new claims in the previous petition a lack of adequate time to prepare and the novelty of the Caldwell decision. (p. 25a) The district court also determined that the claim derived no merit from Caldwell because the trial judge, and not

the jury, is the sole sentencer in Florida (p. 57a, infra). Adams appealed to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. §1291.

The Eleventh Circuit Court of Appeals found the Caldwell decision to be applicable to Florida's sentencing scheme, and concluded that the judge's statements to the jury were misleading. (pp. 7a-12a; 18a-20a, infra). The court ignored procedural bars, finding Caldwell to be a significant change in the law so as to excuse the failure to raise the claim in the previous habeas petition and to establish cause to excuse procedural default in state court, as attorneys lacked the tools to raise this eight amendment claim until the Caldwell decision (pp. 78a-110a, infra). The court then found that Adams was prejudiced by the failure to raise the claim (p.

108a, infra).

Not content with its original opinion, on petition for rehearing the Eleventh Circuit vacated Part I (A)(2), entitled "Procedural Bar" of its original November 13, 1986, opinion and offered further reasoning in support of its decision (p. 78a, infra).

The Supreme Court of Florida has rejected the analysis of the Eleventh Circuit and holds fast to the opinion that such comments must be objected to at trial and raised on direct appeal as Caldwell does not constitute a fundamental change in the law so as to allow consideration of the issue in collateral challenges to the sentence. The court has noted in several cases that such comments, seen in proper context, are accurate. See, e.g. Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987).

REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH THE FLORIDA SUPREME COURT AND THE FIFTH CIRCUIT COURT OF APPEALS REGARDING THE OPINION OF THIS COURT IN CALDWELL V. MISSISSIPPI, AND, THEREFORE, IS DEPRIVING SIMILARLY SITUATED CLASSES INVOLVED IN DEATH PENALTY LITIGATION OF A CONSISTENT STANDARD OF FEDERAL REVIEW.

All of the special and important reasons in Rule 17 of the Rules of the Supreme Court of the United States are present to warrant a review on writ of certiorari of the compelling issues presented in this petition.

A. THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN CONFLICT WITH THE DECISION OF THE HIGHEST STATE COURT IN THE SAME JURISDICTION.

The Eleventh Circuit found Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), to constitute a significant change in the law so as to establish cause to excuse

procedural default in state court and the failure to raise the claim in the first habeas petition. The Supreme Court of Florida has consistently held that impropriety in comments from the bench or prosecutor must be timely objected to at trial in order to obtain appellate review. See, e.g. Middleton v. State, 465 So.2d 1218 (Fla. 1985). State procedural bars, once enforced, preclude federal habeas review. See, Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); Smith v. Murray, 106 S.Ct. 2661 (1986).

The state court has steadfastly followed the standards set forth by this Court. Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1985). The Eleventh Circuit, with equal tenacity, has declined to do so. The result has been a total obstruction of

Florida's ability to enforce it's capital punishment statute through usurpation of the state's appellate power by the Eleventh Circuit.

The state Supreme Court's total disagreement with the views of the Eleventh Circuit was made evident in Copeland v. Wainwright, 505 So.2d 425, 427 (Fla. 1987), where it expressly found the application of such procedural barriers proper because Caldwell does not constitute a fundamental change in constitutional law.

The Eleventh Circuit reaffirmed its unwaivering position in Mann v. Dugger, No. 86-3182, slip op. at 23-24 (11th Cir. May 14, 1987), where it again reached the merits of such a claim without regard for either valid state procedural bars or the

decisions of this Court.[2] See, Harich v. Wainwright, 813 F.2d 1082, 1089 n. 17 (11th Cir. 1987), where it discussed the present case and stated: "...As is evident from Adams, id. at n. 7, a petitioner satisfies the prejudice prong

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[2]Daniel Thomas and David Funchess were executed after having raised claims predicated upon Caldwell v. Mississippi. See, Thomas v. Wainwright, 788 F.2d 684 (11th Cir. 1986); Funchess v. Wainwright, 788 F.2d 1443 (11th Cir. 1986). Thomas, in fact, relied upon the very decision sought to be reviewed. Subsequent to the present decision the Eleventh Circuit decided Harich v. Wainwright, 813 F.2d 1082 (11th Cir. 1987), which involved comments almost identical to the comments in the present case, and concluded that such comments did not minimize the role of the jury.The same panel in Harich most recently reverted to the same subjective grammatical analysis employed in the present case and condemned such statements in Mann v. Dugger, No. 86-3182, slip. op. at 23-24 (11th Cir. May 14, 1987). That Florida death row inmates could meet such differing fates after having raised the same issue can only lead to the conclusion that other unknown, subjective arbitrary considerations are at work, which the Eleventh Circuit has not deigned to share with the State of Florida.

of Sykes when he presents a meritorious Caldwell claim. Accordingly, since there was cause for the failure to raise the Caldwell claim, we will proceed to a discussion of the merits of this claim in lieu of deciding the merits under the guise of a Sykes prejudice inquiry."

Accordingly, it is clear that the highest state court and the federal court hold directly conflicting opinions on an important federal constitutional question, which is an established reason for the grant of certiorari. See, e.g., Andresen v. Maryland, 427 U.S. 463, 470 n. 5 (1976). The conflict is one that can be effectively resolved only by the prompt action of this Court. The reasoning of the Eleventh Circuit is at loggerheads with the reasoning of an equally adamant state court of last

resort, with the result that Florida's death penalty cases cannot move through the federal system.

B. THE FEDERAL COURT OF APPEALS HAS RENDERED A DECISION IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT AND ANOTHER CIRCUIT ON AN EXTREMELY IMPORTANT MATTER OF FEDERAL LAW.

In contrast to the decision of the Eleventh Circuit, the Fifth Circuit, in Moore v. Blackburn, 774 F.2d 97 (5th Cir. 1985), cert. denied, 105 S.Ct. 2904 (1986), barred a Caldwell claim on a successive petition. The Fifth Circuit held that even had the claim not been raised previously, it would have denied the claim as an abuse of the writ, because a competent lawyer would have been aware of the possibility of such a claim. The court cited the language in Caldwell in support of its position. Moore was executed on June 8, 1987.

A fair reading of the Caldwell decision would suggest that the Eleventh Circuit's opinion rests upon a misconstruction of Caldwell. This Court indicated in Caldwell that its decision was not contrary to California v. Ramos, 463 U.S. 992 (1983), stating: "[c]reating this image in the minds of the capital sentencers is not a valid state goal, and Ramos is not to the contrary. Indeed, Ramos itself never questioned the indispensability of sentencers who 'appreciat[e]...the gravity of their choice and...the moral responsibility reposed in them as sentencers.'" 105 S.Ct. at 2643. The Court further recognized the long history of the claim and noted uniform condemnation of such argument. 105 S.Ct at 2642. The claim has been litigated in Florida since 1918. See, e.g., Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918);

Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983). Indeed, Moore's attorney found the tools to raise this claim pre-Caldwell by virtue of the opinions in Ramos, Lockett v. Ohio, 438 U.S. 586, 605 (1978), and Gregg v. Georgia, 428 U.S. 153, 199, 206-07 (1976) (pp. 111a-119a, infra, excerpts of habeas petition). Caldwell, himself, relied upon Ramos, Woodson v. North Carolina, 428 U.S. 280, 304 (1976), Proffitt v. Florida, 428 U.S. 242, 251-252 (1976), and other cases, in bringing his case before this Court (p. 120a, infra, excerpts from petition for writ of certiorari and reply brief on merits in Caldwell). Moreover, this Court in Caldwell did not undertake review until it assured itself that the state court decision did not rest upon adequate and independent state grounds. 105 S.Ct. at 2638.

The Fifth Circuit, and not the Eleventh, has heeded the admonition of Smith v. Murray, 106 S.Ct. 2661, 2667 (1986), that "...as a comparison of Reed and Engle makes plain, the question is not whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Adams had Florida law, the lower court Caldwell decision and numerous decisions of this Court on which to fashion such a claim. In an effort to revert to the more rigid "deliberate bypass" standard the Eleventh Circuit found cause for procedural default from the fact that defense counsel failed to recognize the factual or legal basis for the claim in conflict with this Court's decision in Murray v. Carrier, 106 S.Ct. 2639, 2641 (1986).

Most recently, the Tenth Circuit has followed the reasoning in the present

case in Dutton v. Brown, 812 F.2d 593 (10th Cir. 1987) (petition for certiorari filed April 2, 1987, Supreme Court Case No. 86-1704). This growing division among the circuits will deprive death row inmates similarly situated of a consistent standard of federal review. Thus far, this conflict has proven itself to be capable of repetition while avoiding review. Gerstein v. Pugh, 420 U.S. 103 (1975).

(C) CERTIORARI SHOULD BE GRANTED PURSUANT TO THE SUPERVISORY POWER OF THIS COURT

The Circuit Court's inability or unwillingness to abide by the decisional law of this Court, for any reason, may prompt a grant of certiorari review for the purpose of reaffirming the supremacy of this Court. This supervisory power has historically been used in criminal cases, McNabb v. United States, 318

U.S. 332 (1942); Marshall v. United States, 360 U.S. 310 (1959); United States v. Hasting, 461 U.S. 499 (1983) and has as one of its stated purposes its use as a remedy for the violation of recognized rights.

While these cases refer mainly to a defendant's rights, there exists no prohibition to reciprocal concern for the recognized rights of the states, since they, too, are entitled to justice. Evans v. Bennett, 440 U.S. 1301 (1979).

Federal review power over state criminal proceedings is not supposed to be as broad as review over federal criminal proceedings, McNabb, supra, even under §2254. Sumner v. Mata, 455 U.S. 591 (1982). Absent some exercise of this Court's supervisory power, the unrestrained assumption of review power by the Circuit Court will

substantially disrupt and hamper Florida's established right to enact and enforce its own criminal laws and administer its own independent judicial system.

No mere federal statute can vest this power in a lower federal court, Sumner v. Mata, supra; Atlantic Coast Line Railroad v. Engineers, 398 U.S. 281 (1970), but without intervention, Florida's constitutional rights will continue to be abridged.

II

THE COURT OF APPEALS HAS MISAPPLIED REED V. ROSS, 468 U.S. 1 (1984) TO JUSTIFY ITS REVIEW OF A PROCEDURALLY BARRED CLAIM AND SUCH DECISION SHOULD BE OVERRULED OR LIMITED SO AS TO AVOID TURNING EACH NEW DECISION EMANATING FROM THIS COURT INTO CAUSE AND PREJUDICE FOR IGNORING AN OTHERWISE VALID PROCEDURAL BAR.

Finding that the judge's statements to Adams' jury violated the principles of Caldwell v. Mississippi, the Eleventh Circuit cavalierly concluded that Adams was prejudiced by the statements.

The Eleventh Circuit ceased all analysis upon the finding of cause and never inquired as to the existence of prejudice. Had such inquiry been undertaken the court would have found a decided lack of prejudice, as did the Supreme Court of Florida in Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986), where it stated "...Further, if such information should lead the jury to

'shift its sense of responsibility' to the trial court, the trial court, unlike an appellate court, is well-suited to make the initial determination on the appropriateness of the death sentence." Such obvious harmless error analysis was never undertaken by the Eleventh Circuit.

The cause and prejudice test of Wainwright v. Sykes, 433 U.S. 72 (1977), was extended in United States v. Frady, 456 U.S. 152, 168-170 (1982), where this Court held that to obtain collateral relief from errors in a jury charge the petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process and that the error worked to his actual and substantial disadvantage, not merely that the errors created a "possibility of prejudice." A plainly erroneous reading of Caldwell, however, has resulted in the

notion on the part of the lower court that the prejudice prong can be entirely dispensed with upon finding that a statement would work toward diminishing the jury's sense of responsibility. That the effect of such comments should be looked to, however, was made clear by this Court in Darden v. Wainwright, 106 S.Ct. 2464 n. 15 (1986), where it determined that comments made at the guilt-innocence stage of trial reduced the chance that they had any effect at all on sentencing.

The present decision by the Eleventh Circuit constitutes a complete misreading of Caldwell, and a substantial departure from the rule in Frady, in an apparent attempt to relax the standard for review of constitutional error. Clearly this Court's decision in Sykes and Caldwell never contemplated such future misuse by the Eleventh Circuit, which has created a

virtually untenable situation for the state in avoiding new sentencing proceedings by ignoring any showing of harmless or nonprejudicial error. This Court should accept jurisdiction based upon an improper extension of Caldwell.

CONCLUSION

For these various reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 86-3207

AUBREY DENNIS ADAMS, JR.,

Petitioner-Appellant,

versus

LOUIE WAINWRIGHT,
JIM SMITH,

Respondents-Appellees.

Appeal from the
United States District Court for the
Middle District of Florida

(November 13, 1986)

Before RONEY, Chief Judge, FAY and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

Petitioner, Aubrey Dennis Adams, was convicted in October 1978 of the first degree murder of eight-year-old Trisa Gail Thornley and was sentenced to death in January 1979. His conviction and sentence were affirmed by the Florida Supreme

Court, Adams v. State, 412 So.2d 850 (Fla.), cert. denied, 459 U.S. 882 (1982), and his motions for post-conviction relief pursuant to Fla. R. Crim. P. 3.850, Adams v. State, 456 So.2d 888 (Fla. 1984); Adams v. State, 484 So.2d 1216 (Fla. 1986), and petition for writ of habeas corpus in the Supreme Court of Florida, 484 So.2d 1211 (Fla. 1986), cert. denied, 106 S.Ct. 1506 (1986), were denied.

Adams' first petition for a writ of habeas corpus in the district court was denied without evidentiary hearing and this Court affirmed. Adams v. Wainwright, 764 F.2d 1356, reh'g denied, 770 F.2d 1084 (11th Cir. 1985), cert. denied, 106 S.Ct. 834 (1986). This appeal is taken from the district court's denial of Adams' second habeas petition on March 7, 1986.[1]

The district court found that all of the claims raised in Adams' second petition were barred, either because of

procedural default in the state courts or because raising them in this second habeas petition constituted an abuse of the writ. We affirm in part and reverse in part, with instructions that the district court issue the writ of habeas corpus unless the State of Florida conducts a new sentencing proceeding before an untainted jury.

I. DISCUSSION

In this appeal Adams raises five claims:

(1) violation of Caldwell v. Mississippi through statements by the trial judge that misled the jury as to their role in the sentencing process; (2) incompetency to stand trial; (3) ineffective assistance of counsel through failure to provide Adams with a competent psychiatric expert; (4) ineffective assistance of counsel through failure to challenge the voluntariness of Adams' confession; and (5) ineffective

assistance of counsel through failure to consult an expert pathologist to rebut certain testimony of the State's expert witnesses.

A. Caldwell Claim

At the beginning of jury selection for Adams' trial, the judge instructed the initial panel of prospective jurors as follows regarding the nature and effect of the jury's recommended sentence in a capital murder trial:

> The Court is not bound by your recommendation. The ultimate responsibility for what this man gets is not on your shoulders. It's on my shoulders. You are merely an advisory group to me in Phase Two. You can come back and say, Judge, we think you ought to give the man life. I can say, I disregard the recommendation of the Jury and I give him death. You can come back and say, Judge, we think he ought to be put to death. I can say, I disregard your recommendation and give him life. So that this conscience part of it as to whether or not you're going to put the man to

> death or not, that is not your decision to make. That's only my decision to make and it has to be on my conscience. It cannot be on yours.

The judge gave a substantially similar explanation of the jury's role in the sentencing process each time new prospective jurors were seated in the jury box.[2] He also interrupted counsel's voir dire of prospective jurors on two occasions to reiterate that the court, and not the jury, was responsible for sentencing. Four members of Adams' jury heard these remarks eleven times, three heard the remarks nine times, one heard them six times, one heard them five times, and the remaining three jurors heard them four times.

Adams argues these statements by the judge violated the Eighth Amendment as interpreted in Caldwell v. Mississippi, which held that "it is constitutionally impermissible to rest a death sentence on

a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 105 S.Ct. 2633, 2639 (1985). The district court did not reach the merits of this claim, finding that the failure to raise the claim in Adams' first habeas petition constituted an abuse of the writ, and that the claim also had been procedurally defaulted in the state courts. The district court's findings were based on its determination that Adams' claim "does not derive any merit from the Caldwell decision" because the trial judge, and not the jury, is the sole sentencer in Florida. The district court rejected Adams' argument that the jury plays a critical role in the sentencing process in Florida because the court thought it significant that, while a trial judge in Florida is limited in his ability

to override a jury verdict recommending life imprisonment, "[n]othing in Florida law suggests that a similar presumption of correctness is due a jury recommendation of a death sentence." Because we find that Caldwell is applicable to statements that diminish the sense of responsibility of the advisory jury for its recommended sentence under the Florida system, we find that the district court erred in dismissing this claim on the grounds of abuse of the writ and state procedural default. Further, we find that the judge's statements in this case created an intolerable danger that the jury's sense of responsibility for its advisory sentence was diminished, thereby rendering Adams' death sentence unreliable in violation of the Eighth Amendment.

1. Applicability of Caldwell to Florida's Sentencing Scheme

The district court's determination

that Caldwell was inapplicable to Adams' case was based on an inaccurate assessment of the role of the jury in the Florida system and a misunderstanding of the significance of the jury override. Under Florida's trifurcated procedure in capital felony cases, after a jury determination of guilt, a separate sentencing proceeding is held before the jury, after which the jury renders an advisory sentence based on its weighing of aggravating and mitigating circumstances. Fla. Stat. Ann. § 921.141(1)-(2) (1985). Although the trial judge must then independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community as to whether the death sentence is appropriate in a given case, is entitled to great weight, McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982) (per curiam), and may be

rejected by the trial judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (per curiam). This limitation on the judge's exercise of the jury override provides a "crucial protection" for the defendant. Dobbert v. Florida, 432 U.S. 282, 295 (1977).

In light of the limited nature of the jury override, it is clear that the district court's reliance on the judge's status as the "sole sentencer" was misplaced. While the judge is in fact the only entity that imposes sentence under the Florida scheme, his role is to serve as "a buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). Because of the deference

given the jury's recommended sentence, that recommendation establishes the "parameters" for all subsequent consideration of the appropriate sentence, including that of the trial judge, and makes "[t]he jury's role in an advisory sentencing proceeding...critical." Adams, 764 F.2d at 1364.

Further, the district court's reasoning that the jury did not play a critical role in Adams' sentencing because no presumption of correctness attaches under Florida law to a jury recommendation of death misses the importance of both the jury override and Caldwell. The important consideration is not whether the Tedder presumption of correctness attaches to a sentence recommending death, but whether the judge's statements made it less likely that the jury would recommend life. As this Court recognized in Adams I, "[e]very error in instruction which makes it less

likely that the jury will recommend a life sentence to some degree deprives the defendant of the protections afforded by the presumption of correctness that attaches to a jury's verdict recommending life imprisonment." 764 F.2d at 1364. When the error involves statements that diminish the jury's sense of responsibility for its sentence, Caldwell makes it clear that an impermissible likelihood the jury will be biased in favor of rendering a sentence of death is created. 105 S.Ct. at 2640.[3]

Clearly, then, the jury's role in the Florida sentencing process is so crucial that dilution of its sense of responsibility for its recommended sentence constitutes a violation of Caldwell. In fact, the Florida Supreme Court recently has recognized that the concerns expressed in Caldwell apply to the Florida sentencing scheme, stating

that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation" and that "[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So.2d 360, 367 (Fla. 1986) (citations omitted).[4]

2. Procedural Bar

A district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts; Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985). Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from,

such failure. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110 (1982). A significant change in applicable law, however, can both excuse the failure to raise a claim in a previous petition, Witt, 755 F.2d at 1397, and establish cause to excuse procedural default in state court. Reed v. Ross, 468 U.S. 1, 16 (1984).

Because Caldwell represents a significant change in the law and was not decided until after dismissal of Adams' first habeas petition, we find that raising this claim in a successive habeas petition does not constitute an abuse of the writ. Further, as the legal basis for Adams' claim was not reasonably available to Adams until the Caldwell decision,[5] the district court erred in finding that Adams had failed to establish cause for any procedural default in the state courts.[6]

Adams also was prejudiced by the failure to raise this claim. As discussed below, the judge's statements to Adams' jury clearly violated the principles enunciated in Caldwell, thereby rendering the jury's recommended sentence unreliable.[7]

3. Merits of the Caldwell Claim

Caldwell involved prosecutorial comments during closing argument informing the jury that its decision was not final because it was subject to automatic review by the state supreme court. 105 S.Ct. at 2638. The Supreme Court found that these comments violated the Eighth Amendment because they diminished the reliability of the jury's "determination that death is the appropriate punishment in a specific case" and created a bias in favor of imposition of the death penalty. Id. at 2640. Review of Adams' case in light of the concerns expressed in Caldwell shows that the judge's statements to Adams' jury

created a similar unreliability with regard to the determination that death was the appropriate punishment for Adams.

The Caldwell Court found that delegation of sentencing responsibility to the appellate court would not simply postpone a defendant's right to a fair determination of the appropriateness of his death, but would deprive him of that right because the appellate court does not "confront and examine the individuality of the defendant," but merely reviews the jury determination, giving that determination a presumption of correctness. Id. at 2640-2641. Unlike the appellate court in Caldwell, the Florida judge does have the opportunity to view witnesses and hear evidence. However, Florida has determined that it is the jury which should perform the task of reconciling conflicting evidence and weighing the aggravating and mitigating

factors. Chambers v. State, 339 So.2d 204, 208-09 (Fla. 1976) (England, J., concurring). Therefore, much like the Mississippi appellate court, the Florida trial judge is limited in his ability to override the jury recommendation. The judge's statements to Adams' jury indicating he was free to ignore the jury's recommendation thus were misleading as to the nature of his task in much the same way that the statements in Caldwell were misleading as to the role of appellate review.

The Caldwell Court noted that the danger of bias in favor of the death penalty is created by the possibility that a jury unconvinced that death is the appropriate punishment might nevertheless impose the death penalty as a message of extreme disapproval of the defendant's acts if it believed that its error in doing so would be corrected on appeal.

105 S.Ct. at 2641. The danger that Adams' jury, relieved of responsibility for determining his fate, would feel free to express its outrage at the senseless killing of an eight-year-old girl clearly was present.

The Caldwell Court also found that the prejudicial effect of the prosecutor's argument was increased by the fact jurors would be likely to find minimization of their otherwise difficult role of determining whether another should die attractive, particularly when they were told that the alternative decision makers were legal authorities that they might view as having more of a right to make such an important decision. Id. at 2641-42. In Adams' case, the judge clearly told the jurors that he was the one assigned this decision and that the jurors should not worry about the "conscience part of it." Indeed, because it was the

trial judge who made the misleading statements in this case, representing them to be an accurate description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would have no effect and to have minimized its role than the jury in Caldwell. Cf. id. at 2645 (noting importance of fact trial judge agreed with prosecutor's remarks).

Finally, as in Caldwell, we cannot say that the judge's efforts to minimize the jury's sense of responsibility for Adams' sentence had no effect on the jury's sentencing decision. See id. at 2646.[8] Adams' case is not one in which the only reasonable sentence would have been death. The judge found an equal number (three) of mitigating factors and aggravating factors. Adams v. State, 412 So.2d at 854. Thus, the relative weight placed on those factors by the jury in

Adams' case was especially important, as it is highly unlikely that its recommendation of either life or death would be overturned by the judge.[9] In other words, Adams' case fell within the area of deference to the jury's recommended sentence which makes the need for reliability in that recommended sentence of critical importance.

As in Caldwell, the real danger exists that the judge's statements caused Adams' jury to abdicate its "awesome responsibility" for determining whether death was the appropriate punishment in the first instance. Because in Adams' case the jury's recommended sentence of either life or death would fall within the wide area of deference established by the Tedder standard, Adams might be executed although no sentencer had ever made a considered determination that death was the appropriate sentence if his sentence

were allowed to stand. See Caldwell, 105 S.Ct. at 2641. Therefore, we find that the trial judge's seriously misleading statements regarding the importance and effect of the jury's recommended sentence created an impermissible danger that the recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable, and reverse the district court's denial of Adams' habeas petition.

B. Competency to Stand Trial

Adams asserts he was incompetent to stand trial because of his amnesia regarding most of the events surrounding the crime. This claim was raised in Adams' first petition for habeas corpus and was decided on the merits. When a claim has been decided on the merits in a prior habeas proceeding, it may be dismissed by the district judge, unless the petitioner establishes that the ends of justice would be served by

reconsideration of the claim. Witt, 755 F.2d at 1397. Whether the ends of justice will be served is determined by objective factors, such as whether there was a full and fair hearing on the original petition or whether there was an intervening change in the facts of the case or the applicable law. Id.; accord, Sanders v. United States, 373 U.S. 1, 17 (1963).

Adams asserts that the interests of justice require a rehearing of this claim because of new evidence in the form of two comprehensive psychiatric and psychological evaluations not presented to the district court in Adams' previous petition. The only reason given for not obtaining these reports earlier, however, is that Adams' former habeas counsel was appointed when execution was imminent and therefore did not have time to obtain detailed psychiatric and psychological reports. Failure to present a claim in a

previous habeas petition because of the haste with which the petition was prepared does not prevent that failure from constituting an abuse of the writ. Antone v. Dugger, 465 U.S. 200, 206 n. 4 (1984) (per curiam). This is true even though counsel was appointed when execution was imminent and counsel therefore did not have sufficient time to familiarize himself with the case. Id. The rationale of Antone is equally applicable to the situation where a claim is presented and considered, but the petitioner asserts that significant evidence, although available, was not obtained because of time constraints.[10] The district court did not err in refusing to reconsider this claim.

Further, we agree with the district court's conclusion that the new reports "do nothing to vitiate this Court's prior determination that Petitioner has not

raised a legitimate doubt that he was capable of fully understanding the proceedings against him and cooperating meaningfully with his attorney in preparing his defense." As the district court noted, the new reports merely draw the obvious conclusions as to the effects of Adams' partial amnesia with regard to the events surrounding the crime on his ability to participate in the trial. As we stated in Adams I, "[w]hile a defendant's inability to remember his participation in a crime may have some bearing on whether he is mentally incompetent, it is possible for a defendant to have no recall of his involvement in a crime and yet fully understand the proceedings against him and cooperate meaningfully with his attorney in his defense." 764 F.2d at 1361.

C. Ineffective Assistance of Counsel Claims

Adams asserts three claims of ineffective assistance of counsel. The first claim--failure to provide Adams with a competent psychiatric examination--was raised in Adams' first habeas petition and the district court found that the ends of justice did not require its reconsideration. The other two claims--failure to challenge the voluntariness of Adams' confession and failure to consult a pathologist to rebut the state's expert testimony--were raised for the first time in the second petition. The district court found that the failure to challenge the voluntariness of Adams' confession had been raised in Adams' first 3.850 motion and then intentionally abandoned on appeal so that raising that issue for the first time in a successive petition constituted an abuse of the writ and that the claim regarding failure to consult a pathologist was procedurally barred because it was not

raised in the appropriate state court proceeding.

Adams asserts that the first two claims are based on the new reports which were not available at the time of the first petition because of the haste with which the first petition was prepared. As discussed above, haste in preparation of an initial petition neither excuses the failure to raise a claim in a prior petition nor excuses the failure to present evidence available at the time of that petition. Adams offers no reason why the third claim was not presented in the appropriate state court proceeding, nor does any reason become apparent from review of the record. Therefore, the district court did not err in dismissing these claims.

Further, even if the claims were not barred, we agree with the district court's determination that they are without

merit. To establish ineffective assistance of counsel, the petitioner must show both that counsel acted in a manner professionally unreasonable under the circumstances and that prejudice resulted in the form of a reasonable probability that, but for the challenged conduct, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984). The record does not indicate that the actions of Adams' trial counsel constitute ineffective assistance under the Strickland test.

1. Competent Psychiatric Evaluation at the Time of Trial

Adams asserts that his trial counsel's ineffective assistance deprived him of a competent psychiatric evaluation at trial that would have revealed critical mitigating evidence and evidence of incompetency to stand trial. He argues

his trial counsel should have had the private psychiatrist who examined Adams at the time of trial conduct a more thorough examination regarding Adams' competency, his ability to conform his conduct to the law at the time of the offense, and the voluntariness of his confession.

This Court held in Adams I that no prejudice resulted to Adams from his trial counsel's failure to pursue an incompetency claim because neither the exam that was conducted before trial nor the post-trial examination raised a real, substantial, and legitimate doubt as to his mental competency at the time of trial. 764 F.2d at 1367. As discussed above in connection with the incompetency claim, the new reports contain nothing that would alter that determination. Further, as discussed below, trial counsel did not act in a professionally unreasonable manner in not challenging the

voluntariness of Adams' confession. Therefore, we find this claim without merit.[11]

2. Failure to Challenge Adams' Confession

Adams asserts that his trial counsel did not effectively challenge the voluntariness of Adams' confession because, although he moved before trial to suppress the confession as involuntary, as well as on grounds of inadequate Miranda warnings, he only pursued the Miranda challenge at trial. Adams argues that competent counsel would have (1) contested the voluntariness of Adams' confession at a pretrial hearing utilizing psychiatric evidence, and (2) if unsuccessful in having the confession suppressed, would have submitted the voluntariness and reliability of the confession to the jury through appropriate jury instructions.

In order to establish an ineffective assistance of counsel claim, the defendant

must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy" under the circumstances. Strickland, 466 U.S. at 689. Our review of the record indicates that Adams has failed to overcome this presumption.[12] "[A] strategic decision to pursue less than all plausible lines of defense will rarely, if ever, be deemed ineffective if counsel first adequately investigated the rejected alternatives." Palmes v. Wainwright, 725 F.2d 1511, 1521 (11th Cir. 1984), cert. denied, 105 S.Ct. 227 (1984). The record clearly shows that Adams' attorney had investigated the events surrounding Adams' confession. We cannot say on this record that his decision after that investigation to challenge the confession only on Miranda grounds falls outside "the wide range of

reasonable professional assistance."

Adams' contention that his counsel was ineffective because of failure to request a jury instruction to the effect that the jury should decide the voluntariness of the confession for themselves also is without merit. Under Florida law, once a confession is admitted into evidence, the defendant is entitled to present evidence to the jury pertaining to the circumstances under which the confession was made so the jury can determine the weight to be given the confession. Palmes v. State, 397 So.2d 648, 653 (Fla.), cert. denied, 454 U.S. 882 (1981). The jury does not determine voluntariness of the confession; it simply determines the weight to be given a confession that the judge had determined is voluntary. Id. The record shows that Adams' trial counsel brought out the circumstances surrounding the confession

during his cross-examination of the interrogating officers. The jury instruction given stated that "A confession voluntarily made should be given fair and unprejudiced consideration with due regard to the time and circumstances under which it was made, its harmony or inconsistency with other evidence as well as the motives shown by the evidence to have influenced the making of the confession." This instruction is consistent with Florida law and Adams' counsel was not ineffective in failing to request another, particularly one that would have been inaccurate.

3. Failure to Obtain the Assistance of an Expert Pathologist

At trial, the state called two pathologists who expressed their opinion that the probable cause of death of the victim was strangulation rather than manual suffocation. One expert also

expressed the opinion that the victim's hands were bound before death. This testimony was relevant to the issue of premeditation, and the opinion that the victim's hands were bound before death was one of the factors the state trial judge relied upon in finding the aggravating factor that the capital felony was "especially heinous, atrocious, or cruel." See, Adams v. State, 412 So.2d at 856 (quoting trial judge's sentencing findings). On cross-examination by Adams' trial counsel, these experts admitted that the cause of death and whether the victim's hands were bound before death could not be determined with reasonable medical certainty because of the decomposed state of the body, and one expert stated that death by suffocation was possible. Trial counsel argued these weaknesses in the state's expert testimony during closing argument. Adams argues

that trial counsel should have consulted an expert pathologist to rebut the state's witnesses. In support of this contention Adams offers the affidavit of a county medical examiner, which indicates that the opinions expressed by the state witnesses had no scientific basis.

Counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary" and "a particular decision not to investigate must be directly assessed for reasonableness in all of the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 691. We agree with the district court's determination that, because the weaknesses in the testimony of the state's experts were pointed out to the jury, counsel's failure to further investigate the expert

testimony was not unreasonable and the defense was not prejudiced.

II. CONCLUSION

The district court's denial of a writ of habeas corpus with regard to Adams' Caldwell claim is REVERSED, and this case is REMANDED to the district court with instructions to issue the writ of habeas corpus if the State of Florida does not afford Adams a new sentencing proceeding before an untainted jury. See, Lucas v. State, 490 So.2d 943, 945-46 (Fla. 1986) (error affecting jury's sentencing determination requires new sentencing proceeding before a jury).

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

[1] The district court also denied Adams' motion pursuant to Fed R. Civ. P. 60(b) for relief from the judgment denying his first habeas petition. Adams subsequently moved for voluntary dismissal of his appeal of denial of that motion and this Court denied a certificate of probable cause with regard to that motion and dismissed that appeal on May 23, 1986.

[2] The judge had intended to give this explanation to the entire jury venire before the selection process began, but he forgot to do so, thereby necessitating the procedure actually followed. The explanation was given on nine separate occasions.

[3] We also note that the district court's interpretation of Florida law seems inaccurate. Although the weight to be given the jury's recommendation has most often been considered in Florida in the context of a judge-imposed death sentence despite a jury recommendation of life imprisonment, we have found nothing in Florida law to indicate that only jury recommendations of life imprisonment are entitled to great weight. See, e.g., LeDuc v. State, 365 So.2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979) (per curiam) (on appeal of death sentence recommended by jury and imposed by judge, court stated "[t]he primary standard for our review of death sentences is that the recommended sentence of a jury should not be disturbed if all relevant data was considered, unless there appear strong reasons to believe that reasonable persons could not agree with the recommendation," citing Tedder); Chambers v. State, 339 So.2d 204, 208 (Fla. 1976) (England, J., concurring) (discussing both cases where recommendation was life and recommendation

was death as espousing the same guidelines regarding the jury's role). As discussed above, however, even if Florida did make this distinction, the important consideration is not whether a presumption of correctness attaches to a recommendation of death, but whether the judge's statements made it less likely that a life sentence would be recommended.

[4] In the earlier case of Darden v. State, 475 So.2d 217 (Fla. 1985), the Florida Supreme Court had stated in rejecting a Caldwell claim that "[w]e do not find such egregious misinformation in the record of this trial [as was present in Caldwell], and we also note that Mississippi's capital punishment statute vests in the jury the ultimate decision of life or death, whereas, in Florida, that decision resides with the trial judge." Id. at 221. While this statement suggests that the Florida Supreme Court considers the differences between the Mississippi and Florida systems relevant to the consideration of a Caldwell claim, its later decision in Garcia makes it clear that it does not consider those differences sufficient to make Caldwell inapplicable to the Florida sentencing procedure.

[5] A new development in the law is sufficient to constitute "cause" for a procedural default only if the defendant did not have the legal tools available to construct the claim previously because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle, 456 U.S. at

133-134. We have found no law indicating that this type of claim was being raised by other defendants at the time of Adams' sentencing and his appeal. Despite the state's argument to the contrary, the Tedder decision itself clearly did not provide sufficient basis for raising this claim, as Tedder dealt only with the weight to be given the jury's recommended sentence and not with the constitutional implications of statements that diminish the jury's sense of responsibility for its sentence.

Further, the only Supreme Court pronouncement relevant to Adams' claim before Caldwell was California v. Ramos, 463 U.S. 992 (1983), which upheld a jury instruction informing the jury that the Governor could commute a life sentence without parole. Id. at 1014. This decision, if anything, seemed to sanction statements such as those made by the judge at Adams' trial. Cf. Reed, 468 U.S. at 17 (one way in which new constitutional rule representing clear break with the past may emerge is when the decision disapproves a practice that the Court's former cases arguably have sanctioned). In fact, the Caldwell Court found it necessary to distinguish Ramos, which had been relied upon by the Mississippi Supreme Court in upholding Caldwell's death sentence, in reaching its decision. Caldwell, 105 S.Ct. at 2643.

[6] It is doubtful that procedural default is present in this case because it does not appear that the Florida Supreme Court's holding that Adams' Caldwell claim was barred from consideration in a post-conviction proceeding because of failure to raise it on direct appeal, Adams v. State, 484 So.2d 1216, 1217 (Fla. 1986), constitutes "an independent and adequate"

basis under state law for the denial of relief. Sykes, 433 U.S. at 87; Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986). Under Florida law, claims based on constitutional changes in the law since the time of a petitioner's direct appeal of sufficient magnitude to warrant retroactive application are cognizable in Rule 3.850 proceedings, see Witt v. State, 387 So.2d 922, 929 cert. denied, 449 U.S. 1067 (1980), as are claims involving fundamental errors. See Palmes v. Wainwright, 460 So.2d 362, 365 (Fla. 1984). In fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law). Therefore, the Florida Supreme Court's decision either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 105 S.Ct. 1087, 1093 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitutional error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

[7] The state argues that prejudice cannot be demonstrated because (1) the comments were a correct assessment of Florida law, (2) the judge's instructions to the jury as to aggravating and mitigating factors and their weighing would make it clear the

jury should render its advisory sentence on the individual circumstances of the case and (3) the comments were made during voir dire, when the judge was merely trying to give the prospective jurors some sense of the sentencing structure.

As discussed above, however, the judge's comments were misleading because they left the jury with a false impression as to the significance of their role in the sentencing process. Further, the judge's instructions regarding mitigating and aggravating circumstances did not cure the misleading statements, because there was no withdrawal or correction of those statements. Cf., Caldwell, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements that jury played important role did not cure misleading statements because prosecutor did not retract or undermine those statements). Although the trial judge instructed the jury during the penalty phase not to "act hastily or without due regard to the gravity of these proceedings" and told it to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake," nothing he said corrected the jury's misunderstanding of the significance of its recommendation. In fact, at the beginning of the penalty phase, the judge reinforced his prior comments by stating that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." He also made a similar remark at the beginning of the penalty phase jury instructions. Further, the fact the jury heard these statements during voir dire does not mean that the statements did not influence the jury. These statements were not isolated or insignificant comments. They were made by the judge at a time when he purportedly

was informing the prospective jurors as to their role in the trial, the statements were made repeatedly, and the judge informed the prospective jurors that the substance of these statements was "the most important thing to remember in Phase Two."

[8] It is very clear that the judge's statements were aimed at relieving prospective jurors of any concerns that they might have about recommending a death sentence. Not only did he repeatedly stress to the prospective jurors that they should not worry about the "conscience part of it" but, when two prospective jurors indicated that their opposition to the death penalty would keep them from recommending a death sentence under any circumstances, he probed the strength of their convictions in terms of whether they could not "vote for a recommendation to the Judge for a death penalty, even though the Judge is not bound to follow it."

[9] In fact, Justices Boyd and McDonald dissented from the Florida Supreme Court's affirmance of Adams' sentence and Justice Boyd filed an opinion in which he indicated that Adams' death sentence was disproportionate in light of prior similar cases. Adams v. State, 412 So.2d 850, 857 (Fla. 1982) (Boyd, J., concurring in part and dissenting in part). Justice McDonald dissented from affirmance of the denial of Adams' first Rule 3.850 motion on similar grounds. Adams v. State, 456 So.2d 888, 891 (Fla. 1984) (McDonald, J., dissenting).

[10] We also note that the new reports do not differ in kind from the psychological evidence available to the district court on Adams' first petition and are drawn

from information available at the time of that first petition. Therefore, they are not the type of new evidence that would justify reconsideration of Adams' incompetency claim. Cf. Smith v. Kemp, 715 F.2d 1459, 1468-69 (11th Cir. 1983) (denying reconsideration of habeas claim when new evidence consisted of modified and expanded version of statistics rejected by court in adjudicating merits of first petition and contained additional conclusions drawn from same records available at time of first petition) (court noted that otherwise unsuccessful habeas petitioner could file successive petitions by offering additional arguments and conclusions based on ongoing study).

[11] Adams cites Ake v. Oklahoma, 105 S.Ct. 1087 (1985), in support of his claim of entitlement to a competent psychiatric expert. In Ake, the Supreme Court held that when a defendant demonstrates to the trial judge that his sanity at the time of the offense will be a significant factor at trial, the state must assure the defendant access to a competent psychiatrist. Id. at 1097. As the district court noted, Ake is not applicable because Adams did not make a showing at the time of trial that his sanity would be an issue and did not request a court-appointed psychiatrist. Although Ake does express a recognition of the importance of psychiatric evaluation in some cases, it adds nothing to Adams' ineffective assistance claim, which is not based on the failure to provide a psychiatrist, but on the scope of the psychiatric examination that was conducted. See id. (holding does not mean defendant has constitutional right to choose a psychiatrist of his personal liking).

[12] This Court conducts an independent review of the record in determining the ultimate question of whether a confession was voluntary, Jurek v. Estelle, 623 F.2d 929, 932 (5th Cir. 1980), and in determining whether a petitioner was denied effective assistance of counsel. Smith v. Wainwright, 777 F.2d 609, 615-16, reh'g denied, 785 F.2d 1037 (11th Cir. 1985)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

AUBREY DENNIS ADAMS,

Petitioner,

v. No. 86-64-Civ-Oc-16

LOUIE L. WAINWRIGHT,

Respondent.

ORDER AND OPINION

The above-styled cause is before the Court on a second petition for writ of habeas corpus, filed Wednesday, March 5, 1986 at 3:49 p.m. by AUBREY DENNIS ADAMS, JR., a death row inmate at Florida State Prison. After yet another careful and thorough review of the record in this cause, and after hearing argument of counsel for the respective parties, the Court concludes that the petition for writ of habeas corpus must be denied.

Procedural History

The bulk of the procedural history of this case was set forth in this Court's Order and Opinion denying Petitioner's first petition for writ of habeas corpus, entered Spetember 18, 1984, and need not be repeated here. Said Order was affirmed on appeal in Adams v. Wainwright, 764 F.2d 1356 (11th Cir. 1985), reh'g denied en banc, 770 F.2d 1084 (11th Cir. 1985), cert. denied, ____ S.Ct. ____ (Jan. 13, 1986).

On February 17, 1986, the Governor of Florida signed a death warrant ordering Petitioner's execution during the week commencing February 26, 1986. Execution was scheduled for March 4, 1986 at 7:00 a.m. Petitioner filed a petition for writ of habeas corpus in the Supreme Court of Florida on February 21, 1986, which was denied on February 26, 1986. Petitioner

thereafter filed an application for stay of execution pending filing of a petition for writ of certiorari in the United States Supreme Court, which was denied February 28, 1986. The Supreme Court also denied a motion to reconsider its denial of the stay on March 1, 1986.

Petitioner filed a motion to vacate judgment and sentence pursuant to Florida Rule of Criminal Procedure 3.850 and an application for stay of execution on March 2, 1986. On March 3, 1986, the state trial court denied these motions, the Florida Supreme Court affirmed this denial, and the Governor suspended the execution of the sentence imposed upon Petitioner pending the outcome of an examination of the mental condition of said inmate conducted pursuant to Fla. Stat. § 922.07.

Petitioner filed the instant petition for writ of habeas corpus on March 5,

1986. The next day, the Governor of Florida dissolved the stay and signed a third death warrant ordering Petitioner's execution during the week commencing March 6, 1986. Because the execution was scheduled for March 7, 1986 at 10:00 o'clock a.m., this Court held an emergency hearing on the petition on March 6, 1986, commencing at 7:50 p.m. At the conclusion of this hearing, the Court learned that the United States Supreme Court had just vacated its order of February 28, 1986 and granted a stay of the impending execution pending its determination of whether to grant a writ of certiorari on Petitioner's claim premised upon Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985).

Abuse of the Writ

Because this is a successive petition, and Respondents allege an abuse of the writ of habeas corpus, the Court must consider whether the claims raised

herein should be barred pursuant to Rule 9(b) of the Rules governing 28 U.S.C. § 2254. Rule 9(b) provides as follows:

> (b) Successive petitions.
>
> A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

This rule restates the judicially developed doctrine of abuse of the writ, and provides that successive federal habeas petitions will not be entertained (1) with respect to issues which were raised and adjudicated on the merits in a previous petition if the ends of justice would not be served by reconsideration of the merits, and (2) with respect to issues not previously presented in an earlier petition if failure to raise the issues is the result of inexcusable neglect or

intentional abandonment or withholding. See Sanders v. United States, 373 U.S. 1 (1963); Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985). Because the State has alleged an abuse of the writ by this second federal habeas petition, Petitioner must bear the burden of rebutting this contention.

Grounds for Relief

Petitioner's first claim is that he was not competent to stand trial. This claim was presented and addressed in Petitioner's first habeas petition and it is therefore barred unless Petitioner can establish that the ends of justice require its reconsideration. Petitioner contends that the ends of justice require revisiting this issue because Petitioner has obtained extensive examinations and diagnoses for the first time. These examinations were allegedly unavailable when Petitioner was first before this

Court due to the severe time constraints caused by counsel's agreement to represent Petitioner after a death warrant had been signed in 1984.

The Court finds that Petitioner has not met his burden of refuting the state's contention of abuse of the writ. The ends of justice do not warrant reconsideration of this claim for several reasons. First, the recently obtained opinions of Dr. Dennis F. Koson and Dr. Manuel Chaknis, attached as Exhibits A and B to the instant petition, diagnose Petitioner as having a genuine amnesia for the circumstances surrounding the offense. This diagnosis was considered by the Court at the time of Petitioner's first habeas petition, as this was also the opinion of Dr. Sandra Gilels. Dr. Gilels evaluated Petitioner after the conviction, and concluded on February 21, 1984 that Petitioner suffers from catathymic

amnesia, a mental disorder that renders him unable to recall traumatic experiences. The newly obtained reports differ from that of Dr. Gilels only in that they draw the obvious conclusions regarding the impact of this memory loss on Petitioner's competency to stand trial; to-wit, "He was and is unable to disclose to his attorney pertinent facts surrounding the event, his involvement or lack of involvement, and details concerning his own state of mind, behavior and emotional condition at the time of the offense, thus compromising his ability to assist counsel rationally in the implementation of a defense."

As the Eleventh Circuit noted on the appeal from this Court's denial of Petitioner's first habeas petition, "The right not to be tried and sentenced unless mentally competent does not extend so far as to ensure total recall." Adams v.

Wainwright, 764 F.2d 1356, 1361 (11th Cir. 1985). While the opinions of Drs. Koson and Chaknis reaffirm that Petitioner has no recall of his involvement in this crime, they do nothing to vitiate this Court's prior determination that Petitioner has not raised a legitimate doubt that he was capable of fully understanding the proceedings against him and cooperating meaningfully with his attorney in preparing his defense. Dusky v. United States, 362 U.S. 402 (1960). These reports do not provide any basis for believing that at the time of trial, as opposed to the time of the offense, Petitioner was too confused or emotionally disturbed to communicate or cooperate with counsel in planning a defense. Indeed, the record belies any such contention because Petitioner's counsel did not claim at any time during trial or sentencing that the Petitioner was in fact

incompetent. Nor does Petitioner now proffer the affidavit or testimony of Petitioner's trial counsel that he could not cooperate meaningfully with Petitioner at the time of trial.

The Court also finds Petitioner's contention that the newly obtained psychiatric and psychological reports were unavailable in 1984 due to habeas counsel's severe time constraints unconvincing. In February of 1984, Philip Padovano, Esq. obtained the opinion of Dr. Gilels, and nothing in the record explains why Petitioner's counsel could not have obtained additional psychiatric or psychologic opinions at that time, before the first petition for habeas corpus was filed, if such additional reports were deemed necessary.

In connection with the issue of Petitioner's competence to stand trial, Petitioner also claims that he did not

receive the assistance of a competent mental health expert at trial and that trial counsel was ineffective in failing to obtain a competent mental exam. These claims were addressed and rejected in the first petition for habeas corpus, and the ends of justice do not require their reconsideration. For reasons set forth in this Court's opinion entered September 18, 1984 and the opinion of the appellate court in Adams v. Wainwright, 764 F.2d at 1367-69, trial counsel's conduct in investigating Petitioner's mental competency and deciding not to pursue a claim of incompetency did not result in prejudice to Petitioner. In addition, Ake v. Oklahoma, 105 S.Ct. 1087 (1985), is distinguishable because Petitioner never made a showing to the trial court that his competency would be a significant factor at trial.

Petitioner also relies on the

recently obtained medical reports to support a claim that the inculpatory statement he gave during his interrogation on the night of March 15, 1978 was involuntary because he was psychologically coerced. The Court concludes that this ground for relief is barred by the abuse of the writ doctrine because it was not raised in the first federal habeas petition and Petitioner has not shown that his failure to previously raise it is not attributable to inexcusable neglect or deliberate bypass.

The Court finds that this claim was intentionally abandoned because Petitioner raised it in his first Rule 3.850 motion, and after the state trial court denied that motion, Petitioner did not pursue the claim on appeal to the Florida Supreme Court or in his first habeas petition filed in this Court.

Moreover, a review of the record

regarding this interrogation, and even of the recent opinion of Dr. Koson, suggests that a decision to abandon this claim was certainly reasonable. While statements made during a period of mental incompetency are not admissible, mere emotionalism, confusion, or depression do not dictate a finding of mental incompetency. See United States v. Rouco, 765 F.2d 983, 993 (11th Cir. 1985). Petitioner's claim that his confession was inadmissible because it was obtained by trickery is similarly without merit. See United States v. Castaneda-Castaneda, 729 F.2d 1360, 1363 (11th Cir. 1984). The "totality of the circumstances" surrounding his interrogation do not indicate a finding of coercion. Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973). Lastly, Petitioner's present contention that he was not given an adequate Miranda warning must fail. Once

administered properly, neither breaks in interrogation nor change in location or focus requires readministration of Miranda warnings. Wyrick v. Fields, 459 U.S. 42 (1982). Thus, even if Petitioner's counsel had had the benefit of Dr. Koson's observations that Petitioner was tired, afraid, hungry, and anxious to end the interrogation, all indications are that he justifiably concluded that an involuntary confession claim was not worthy of pursuit in the trial court, on direct appeal, or in collateral review proceedings.

Petitioner's second claim is that the trial court's repeated inaccurate and misleading assurances to the jury that it bore no responsibility for determining Petitioner's sentence rendered that sentence unreliable and violated the standards enunciated in Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). This claim was not raised in Petitioner's first

habeas corpus petition. In response to the state's claim of abuse of the writ, Petitioner contends that his failure to previously raise this claim is not attributable to inexcusable neglect or intentional withholding of the claim, because Caldwell was not decided at the time of the first habeas petition.

The Court herein finds that Petitioner's claim does not derive any merit from the Caldwell decision and, therefore, the mere fact of an intervening change in the law does not excuse his failure to raise this claim previously. See Stephens v. Kemp, 721 F.2d 1300 (11th Cir. 1983). Similarly, given the Court's conclusion that Caldwell does not apply in the instant case, Petitioner cannot show cause and prejudice for his procedural default in the state courts, and Wainwright v. Sykes, 434 U.S. 880 (1977), bars consideration of this claim.

Caldwell held a death sentence invalid because the sentencing jury was led to believe that responsibility for determining the appropriateness of the death sentence rested not with the jury but with the appellate court that would later review the case. The Supreme Court found that the reliability of the death sentence had been undermined in that case because the existence of appellate review did not prevent the result that a defendant might be executed when no sentencer has ever made a determination that death was the appropriate sentence. Caldwell simply holds that the sentencer must not have a diminished sense of responsibility. Petitioner's claim that the advisory jury in the instant case felt a diminished sense of responsibility is insufficient to warrant the conclusions reached in Caldwell because, under Florida's death penalty statute, the trial

judge, not the jury, is the sole sentencer. The constitutionality of this specific aspect of Florida's capital sentencing statute was recently upheld in Spaziano v. Florida, 104 S.Ct. 3154 (1984).

Petitioner nonetheless argues that Caldwell applies because the advisory jury plays a critical role in Florida's capital sentencing scheme, citing Tedder v. State, 322 So.2d 908 (Fla. 1975). However, Tedder simply held that a trial judge may not override a jury verdict recommending life imprisonment and impose a sentence of death unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id. at 910. Nothing in Florida law suggests that a similar presumption of correctness is due a jury recommendation of a death sentence. In sum, because the sentencer

in this case was the trial judge, and because the portions of the transcript cited by Petitioner in support of this claim reflect that the trial judge was well aware of his "awesome responsibility" in rendering Petitioner's sentence, the standards set forth in Caldwell are satisfied.

Petitioner's third claim is that the prosecutor's immproper and inflammatory arguments to the jury rendered the death sentence in this case unfair and unreliable in violation of the Eighth and Fourteenth Amendments. This claim was not raised in the first habeas petition and the Court finds that failure to previously raise this issue is the result of inexcusable neglect or intentional abandonment. Despite the time constraints surrounding the preparation of the first habeas petition, Petitioner's counsel obviously had time to examine the

prosecutor's argument because he relied upon it in raising other issues for the first habeas petition. A claim of improper prosecutorial argument may be based upon the trial transcript and does not require additional time to investigate facts outside the record. Moreover, this claim does not derive any additional merit by reason of the Supreme Court's recent decision in Caldwell, supra.

Even assuming that failure to previously raise this claim does not constitute an abuse of the writ, Petitioner cannot demonstrate the requisite prejudice to overcome the procedural default bar pursuant to Wainwright v. Sykes, supra, because the Court herein concludes that this claim of improper prosecutorial argument does not warrant relief.

To obtain habeas corpus relief on the grounds of improper prosecutorial

argument, Petitioner must establish that the argument was improper and that it rendered his trial fundamentally unfair. See Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The Eleventh Circuit has held that to determine whether Petitioner's trial was rendered fundamentally unfair, this Court must ascertain whether there is a reasonable probability that the outcome of the proceedings would have been different had the improper argument not been made. Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985). In making this determination, the Court should not view the improper comments in isolation, but should evaluate the improper comments in the context of the entire proceeding. Id.

Of course, the threshold issue is whether the prosecutorial comments challenged by Petitioner were improper. Petitioner alleges first that the

prosecutor improperly commented on facts not in evidence when he stated that Petitioner "said he tried to have intercourse with her but she was too small." Transcript at 443. The testimony at trial did not specifically reflect that Petitioner's reason for not having intercourse with the victim was that she was "too small," so this comment was improper.

Petitioner next objects to a few instances during the prosecutor's argument in which he gave a personal opinion on the evidence. It is undoubtedly improper for a prosecutor to give his personal opinion. See, e.g., Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985); Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

Finally, Petitioner contends that the prosecutor improperly advocated the death sentence as a means of deterrence during the guilt/innocence phase and the penalty

phase of the trial. The Court finds that the referenced portion of the guilt/innocence phase of the transcript, Transcript at 1318, does not constitute an argument that the jury convict Petitioner in furtherance of deterrence goals. During the penalty phase, however, the prosecutor did advocate deterrence as a justification for the death sentence, but this advocacy was proper because deterrence is a legitimate sentencing consideration. See Bowen v. Kemp, 769 F.2d 672 (11th Cir. 1985); Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); Collins v. Francis, 728 F.2d 1322 (11th Cir. 1984).

The Court finds that the improper aspects of the prosecutor's argument , his comment on facts not in evidence and his personal opinions, did not render Petitioner's entire trial fundamentally unfair. This Court is confident that the improper comments were too insignificant

to have any bearing on the jury's verdict.

Petitioner's fourth claim for relief is that he was denied due process of law at his sentencing because he was never provided an opportunity to review the presentence investigation report relied upon by the trial judge before sentence was imposed in violation of the standards set forth in Gardner v. Florida, 430 U.S. 349 (1977). This claim was not raised in Petitioner's first habeas petition and the Court finds that Petitioner's failure to previously make this claim is the result of inexcusable neglect or intentional abandonment.

Petitioner contends that he can prove that he never saw or read the presentence investigation report, as this is admitted by trial counsel. However, Petitioner does not explain why this fact was not and could not have been brought out earlier, and has not satisfied his burden of

establishing an excuse for his neglect.

In addition, the Court concludes that consideration of this claim is barred by the procedural default rule. Wainwright v. Sykes, supra. Petitioner has not demonstrated cause to show why this claim was not raised by objection at sentencing or on direct appeal. Both the facts and the law necessary to bring this claim were available to Petitioner at all stages of the prior proceedings. Engle v. Isaac, 456 U.S. 107 (1982). Trial counsel was certainly aware at the time of sentencing whether he had provided Petitioner a chance to review the presentence report.

Petitioner makes a related argument that trial counsel rendered ineffective assistance in failing to provide Petitioner with a copy of the presentence investigation report at sentencing. Petitioner's delay in raising this contention is also an abuse of the writ,

as petitioner has offered no excuse for failing to raise it earlier. Even if Petitioner's present counsel only recently obtained trial counsel's "admission," no explanation has been provided to show why Petitioner could not have presented the facts necessary to support this claim at the time of filing the first habeas petition.

Consideration of this claim is also barred by Petitioner's procedural default because, as noted above, Petitioner cannot demonstrate the requisite cause for his failure to raise this claim at the appropriate time in the state court proceedings.

Petitioner's fifth claim is that he was denied due process and the effective assistance of counsel because trial counsel failed to consult or call an expert to refute the testimony of the State's experts that supported findings of

premeditation and the aggravating circumstances. Petitioner contends that the jury was never made aware that certain of the State experts' conclusions had no scientific basis whatsoever because defense counsel never consulted a pathologist before trial.

In support of his contention that the testimony of the State's experts was based upon mere speculation, Petitioner relies upon the recently obtained affidavit of Dr. Robert Stivers, the Fulton County, Georgia medical examiner, attached as Appendix R to the instant petition. The Court has reviewed this affidavit and concludes that this opinion, or a similar opinion of another expert, was not necessary at trial to point out the weaknesses in the testimony of the state's experts. On cross-examination, the state's experts admitted that death by suffocation was possible, and that no one

could say with reasonable medical certainty that the cause of death was strangulation. These weaknesses in the state's evidence of premeditation were pointed out by Petitioner's trial counsel during closing arguments. Under these circumstances, if Petitioner's trial counsel did indeed fail to consult an expert, this failure did not deprive Petitioner of "an adequate opportunity to present [his] claims fairly within the adversarial system." Ake v. Oklahoma, 105 S.Ct. 1087 (1985). Because trial counsel's cross-examination was effective to undermine the state's expert testimony, counsel was not ineffective for failure to further investigate this testimony, see Strickland v. Washington, 104 S.Ct. 2052, 2066 (1984), and the defense did not suffer any prejudice from counsel's performance.

Finally, in view of the Court's

conclusion that this claim is without merit, Petitioner cannot show the requisite cause and prejudice for his failure to raise this claim in the appropriate state court proceedings, and this claim is barred from consideration by Wainwright v. Sykes, supra.

Petitioner's sixth claim is that the evidence was insufficient to convince any rational trier of fact of his guilt and of the existence of aggravating circumstances beyond a reasonable doubt. The Court finds that failure to raise this claim in the first habeas petition constitutes an abuse of the writ. As is true with Petitioner's claim regarding improper prosecutorial argument, time restraints do not excuse Petitoner's neglect in failing to previously raise this issue because its viability could have been ascertained simply by reviewing the trial transcript and the applicable law.

Even if Petitioner's neglect were excusable, this ground for relief would be barred because Petitioner cannot show prejudice for his procedural default. Wainwright v. Sykes, supra. The Court has thoroughly reviewed the transcript of Petitioner's trial, viewing the evidence in the light most favorable to the prosecution, and finds sufficient evidence therein of premeditation to convince a rational trier of fact of Petitioner's guilt beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979). Assuming, without deciding, the correctness of Petitioner's contention that a federal habeas court must review the sufficiency of the evidence to support the aggravating circumstances found by the sentencer, the Court finds that sufficient evidence exists in the record to support the trial court's finding of the three statutory aggravating circumstances.

Petitioner's seventh claim for relief is that his sentencing proceeding was unconstitutional because: (1) there was a lack of adversarial testing and presentation of evidence at sentencing; (2) there was a lack of argument for Petitioner's life at sentencing; and (3) there was a lack of deliberative consideration by the trial court.

Petitioner raised these first two contentions in his first habeas corpus petition in the form of a claim that counsel rendered ineffective assistance at sentencing. The ends of justice do not warrant reconsideration of these arguments because they are entirely without merit. Although Petitioner proffers the opinions of Drs. Koson and Chaknis to show that substantial mitigating evidence about his character and background exists, this Court's prior opinion reveals that much of this evidence was actually introduced at

the sentencing phase of Petitioner's trial and the trial court consequently made findings of three mitigating circumstances, including that Petitioner was under the influence of extreme mental or emotional disturbance at the time he committed the offense. Thus, presentation of these aspects of this claim in this successive petition constitutes an abuse of the writ.

Petitioner's third contention that the trial court did not give deliberative consideration to the mitigating evidence was not specifically raised in the first habeas petition, and Petitioner has not shown that this omission did not result from inexcusable neglect or deliberate bypass. Petitioner's sole basis for this serious allegation is that the trial judge entered findings of fact identical to those submitted by the prosecution.

Petitioner asserts that failure to

previously present this argument is excusable because the identity of the trial judge's findings and those offered by the prosecutor was unknown at the time of filing the first federal habeas petition. The Court finds that this contention is too frivolous to require consideration in this successive petition. Even assuming the trial judge adopted the state's written findings of fact verbatim, this fact does not in any way suggest that the trial judge failed to give deliberative consideration to his findings. As noted previously herein, the record is replete with indications that the trial judge fully recognized his grave responsibility in sentencing Petitioner to death.

Petitioner's eighth and final ground for relief is that he was denied due process of law by virtue of the death-qualification voir dire procedure

undertaken at the commencement of his trial. Petitioner argues that exposure to death-qualifications rendered the jurors predisposed to find him guilty. The Court finds that Petitioner's failure to make this claim in his first habeas petition constitutes an abuse of the writ, and rejects Petitioner's contention that his neglect in raising this issue is excusable because the claim is based upon an intervening change in the law.

The present law governing Petitioner's habeas petition has not been changed to provide that exposure to death-qualification voir dire procedure unconstitutionally predisposes jurors to find the defendant guilty. Petitioner cites no binding precedent or persuasive authority to support his claim, although he seeks to rely on the recent Eighth Circuit case of Grigsby v. Mabry, 758 F.2d 226 (8th cir. 1985), which is presently

pending before the United States Supreme Court. However, the instant claim is significantly different from the issue raised and decided in Griqsby. Petitioner is not here alleging that jurors with qualms about the death penalty were challenged for cause and excluded from the guilt/innocence phase of the trial, thus depriving him of a jury which represents a fair cross-section of the community.

In sum, the Court concludes that the claims raised in this successive Petition are barred from consideraton by the abuse of the writ doctrine and by Petitioner's procedural default in the state courts. Moreover, the Court is satisfied that its failure to consider these claims will not result in a miscarriage of justice because the merits of these claims are far from compelling. Accordingly, the Court now

ORDERS and ADJUDGES:

1. That the Petition for Writ of

Habeas Corpus, filed herein on March 5, 1986, is hereby DENIED;

2. That the Motion for Evidentiary Hearing on Abuse of the Writ Issue, filed herein on March 5, 1986, is hereby DENIED;

3. That the Motion for Stay of Execution, filed herein on March 6, 1986, be and the same is hereby DENIED.

4. That Petitioner is hereby granted leave to appeal in forma pauperis pursuant to 28 U.S.C. § 1915;

5. That this Court hereby issues a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), this decision; and

6. That the Clerk of the Court shall enter Judgment dismissing this action.

DONE and ORDERED in Chambers at Jacksonvile, Florida this 7th day of March, 1986, at 6:00 p.m. o'clock.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 86-3207

AUBREY DENNIS ADAMS, JR.,

Petitioner-Appellant,

versus

RICHARD L. DUGGER, ROBERT BUTTERWORTH,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(April 23, 1987)

ON PETITION FOR REHEARING

(Opinion Nov. 13, 1986, 11 Cir., ___ F.2d ___).

Before RONEY, Chief Judge, FAY and JOHNSON, Circuit Judges.

PER CURIAM:

Part I(A)(2), entitled "Procedural Bar," is hereby vacated and the following

is substituted in lieu thereof:

2. Abuse of the Writ and Procedural Bar

A district court need not consider a claim raised for the first time in a second habeas petition, unless the petitioner establishes that the failure to raise the claim earlier was not the result of intentional abandonment or withholding or inexcusable neglect. Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts; Witt v. Wainwright, 755 F.2d 1396, 1397 (11th Cir. 1985). Consideration of a claim also can be barred by failure to comply with state procedural rules, absent a showing of cause for, and prejudice resulting from, such failure. Wainwright v. Sykes, 433 U.S. 72, 87 (1977); accord, Engle v. Isaac, 456 U.S. 107, 110 (1982).

Because the district court's determination that Adams' failure to raise his Caldwell claim in his first habeas

petition and its determination that the claim was procedurally barred both were based on the district court's erroneous conclusion that Caldwell was inapplicable, the district court clearly abused its discretion in finding abuse of the writ and procedural bar on that basis. Further, as discussed below, we find that neither the abuse of the writ doctrine nor procedural bar precludes our consideration of the merits of this claim.

a. Abuse of the Writ

We find no evidence that Adams' failure to raise this claim in his earlier petition was the result of inexcusable neglect or deliberate withholding. The Caldwell decision, upon which the claim is based, clearly was not available to Adams at the time he filed his first petition in September 1984. Indeed, the Supreme Court did not grant certiorari in Caldwell until after the district court had denied Adams'

first petition. Cf. Bowden v. Kemp, 793 F.2d 273, 275 & n. 4 (11th Cir 1986) (finding abuse of the writ when previous petition was filed after the Supreme Court had granted certiorari in case upon which petitioner relied). Nor is the Eighth Amendment argument raised by Adams in this petition one of which he should have been aware at the time of filing his first petition. This claim is not one which had been raised and considered in a number of other cases at the time of that petition. Cf. Witt, 755 F.2d at 1398 (finding abuse of the writ when claim raised in case upon which petitioner relied "had been raised long before [that] case" so that failure to present the claim in his first petition was "necessarily attributable to abandonment or inexcusable neglect").

Nor did Supreme Court precedent at the time of Adams' first habeas petition

make it evident that statements such as those made by the trial judge in this case implicated the Eighth Amendment. In fact, if anything, that precedent indicated that the contrary was true. In California v. Ramos, 463 U.S. 992 (1983), the Supreme Court decision most relevant to Adams' claim before Caldwell, the Supreme Court found "no constitutional defect" under the Eighth Amendment in a jury instruction that informed jurors of the California governor's power to commute a life sentence without possibility of parole to a lesser sentence that included the possibility of parole. Id at 994. In doing so, the Court rejected petitioner's arguments that such an instruction created an unacceptable level of unreliability in the capital sentencing determination, that it deflected the jury from its task of basing the penalty decision on the character of the defendant and the nature

of the offense, and that the instruction was misleading because it did not inform the jury that the governor also could commute a death sentence. Id. at 998. The Court indicated that, although its previous Eighth Amendment decisions had placed some substantive limits on the particular factors that a capital sentencing jury may consider in determining whether death is appropriate, the principal concern of the Court's Eighth Amendment jurisprudence had been "with the procedure by which the State imposes the death sentence [rather] than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Id. at 999 (emphasis in original). Except for the specific substantive limitations imposed by its

previous decisions, none of which the Court found were applicable to the jury instruction at issue in Ramos, the Court stated that it had "deferred to the State's choice of substantive factors relevant to the penalty determination." Id. at 1001. Further, in rejecting the contention that the instruction was misleading because of its failure also to inform jurors of the governor's power to commute a death sentence, the Court recognized that an instruction regarding the power to commute a death sentence "may incline [the jury] to approach their sentencing decision with less appreciation for the gravity of their choice," but stated that, given its holding that informing the jury of the commutation power did not implicate the Constitution, the Court's statements should not be read as suggesting that "the Federal Constitution prohibits an instruction

regarding the Governor's power to commute a death sentence." Id. at 1011-12 & n. 27.[1]

The abuse of the writ doctrine should be "of rare and extraordinary application." Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir.), cert. denied, 449 F.2d 885 (1980). We do not find its application warranted with regard to this

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[1] In reaching its decision in Caldwell, the Court found it necessary to distinguish Ramos, which had been relied upon by the Mississippi Supreme Court in upholding Caldwell's death sentence. Caldwell, 105 S.Ct. at 2643. In fact, both the majority and the dissent on the Mississippi Supreme Court had interpreted Ramos as "leav[ing] the decision of whether to inform the jury of extraneous matters with the individual states." Caldwell v. State, 443 So.2d 806, 816 (Miss. 1983), rev'd in part, Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) (Lee, J., dissenting); id. at 813. Their disagreement was over whether there was reversible error as a matter of state law. See id. at 816.

claim.[2]

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[2] We note that statements regarding appellate review such as those involved in Caldwell had been held to be reversible error as a matter of state law by a number of states. Caldwell, 105 S.Ct. at 2642. In fact, several pre-Furman cases in Florida held that remarks by the trial judge or the prosecutor regarding appellate review constituted reversible error. E.g., Pait v. State, 112 So.2d 380, 383-85 (Fla. 1959) (prosecutorial statements regarding appellate review held reversible error); Blackwell v. State, 79 So. 731, 735-36 (Fla. 1918) (prosecutorial comments regarding appellate review approved by trial judge held reversible error). The fact a practice may be condemned as a matter of state law, however, does not indicate that the same practice constitutes an Eighth Amendment violation. As the Supreme Court noted in Ramos, "States are free to provide greater protections in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1014.

Further, at the time of Adams' first habeas petition, this Circuit had considered the argument that prosecutorial and judicial comment on the appellate process rendered a petitioner's trial fundamentally unfair in violation of the due process clause of the Fourteenth Amendment. E.g., Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983), cert. denied, 467 U.S. 1220 (1984) (judge's reference to right of automatic appeal did not render trial fundamentally unfair); McCorquodale v. Balkcom, 705

F.2d 1553, 1556 (11th Cir. 1983), rev'd on reh'g en banc on other grounds, 721 F.2d 1493 (1984), cert. denied, 466 U.S. 954 (1984) (prosecutor's remark regarding appellate review did not render trial fundamentally unfair). The fact Adams may have had a basis for raising a due process claim by analogy to these decisions at the time of his first habeas petition, however, does not indicate that his failure to raise the Eighth Amendment claim he now raises was the result of intentional abandonment or inexcusable neglect. It is clear that not every claim that implicates the fundamental fairness standards embodied in the due process clause necessarily implicates the Eighth Amendment as well. Indeed, although both Corn and McCorquodale were capital cases, neither gives any indication that the Eighth Amendment is implicated by statements regarding appellate review. Both assume that the proper analysis of such a claim is under the fundamental fairness standard of the due process clause as enunciated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The distinction between claims that implicate the fundamental fairness standards embodied in the due process clause and those that implicate the Eighth Amendment has been recognized from the inception of the Supreme Court's modern Eighth Amendment jurisprudence. The year before the Supreme Court held in Furman v. Georgia, 408 U.S. 238 (1972), that Georgia's death penalty statute violated the Eighth Amendment, the Court rejected the contention that discretion

b. Procedural Bar

Adams' Caldwell claim was raised for the first time in state court in his second 3.850 motion. The Florida Supreme Court refused to consider the merits of that claim because it had not been raised

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in imposing the death penalty violated the fundamental fairness standards embodied in the due process clause of the Fourteenth Amendment. McGautha v. California, 402 U.S. 183 (1971). See Lockett v. Ohio, 438 U.S. 586, 599 (1978) (plurality opinion) ("Thus, what had been approved under the Due Process Clause of the Fourteenth Amendment in McGautha became impermissible under the Eighth and Fourteenth Amendments by virtue of the judgment in Furman."). In fact, the three dissenting justices in Caldwell argued that the claim involved in that case did not implicate the Eighth Amendment and should have been analyzed instead as a due process claim. Then Justice Rehnquist stated that he found "unconvincing the Court's scramble to identify an independent Eighth Amendment norm that was violated by the statements" in Caldwell, and argued that the Court's inquiry should have been the due process inquiry as to "whether the statements rendered the proceedings as a whole fundamentally unfair." 105 S.Ct. at 2650 (Rehnquist, J., dissenting) (joined by Burger, C.J., and White, J.).

on direct appeal. Adams, 484 So.2d at 1217.[3] Failure to comply with an independent and adequate state procedural rule ordinarily precludes federal habeas review of a claim, absent a showing of cause for, and prejudice resulting from, the procedural default. Sykes, 433 U.S. at 87, Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986) (en banc). It is doubtful, however, that an adequate and independent state law ground is present in this case.

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[3] The state asserts that the Supreme Court held this claim barred both because of Adams' failure to raise it on direct appeal and because Adams' failure to raise it in his first 3.850 motion constituted an abuse of the 3.850 procedure. This interpretaton of the Florida Supreme Court's decision is not supported by the language of that opinion. That language makes it clear that the Florida Supreme Court applied abuse of the 3.850 procedure to bar claims that "ha[d] been considered and ruled upon in the previous motion for post-conviction relief." 484. So.2d at 1217. Adams' Caldwell claim was not raised in his prior 3.850 motion.

Under Florida law, claims based on constitutional changes in the law since the time of a petitioner's direct appeal of sufficient magnitude to warrant retroactive application are cognizable in Rule 3.850 proceedings, Witt v. State, 387 So.2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980); Tafero v. State, 459 So.2d 1034, 1035 (Fla. 1984) (finding Enmund v. Florida, 458 U.S. 782 (1982), a change in law cognizable in post-conviction proceedings); Edwards v. State, 393 So.2d 597, 600 n.4 (Fla. App.), petition denied, 402 So.2d 613 (Fla. 1981) (finding Cuyler v. Sullivan, 446 U.S. 335 (1980), a change in law cognizable in post-conviction proceedings), as are claims involving fundamental errors, despite the failure to raise such claims on direct appeal. E.g., Palmes v. Wainwright, 460 So.2d 362, 365 (Fla. 1984) (suppression of

evidence is fundamental error cognizable in collateral proceedings); Nova v. State, 439 So.2d 255, 261 (Fla. App. 1983) (infringement of right to jury trial held fundamental error); Reynolds v. State, 429 So.2d 1331, 1333 (Fla. App. 1983) (sentencing error that could cause defendant to be incarcerated for greater length of time than provided by law is fundamental and "petitioner is entitled to relief in any and every legal manner possible"). In fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set

aside"). Therefore, the Florida Supreme Court's holding that Adams' Caldwell claim is barred for failure to raise it on direct appeal either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitutional error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

Further, we find that Adams has established cause and prejudice for any procedural default resulting from his

failure to raise this claim on direct appeal. When "a constitutional claim is so novel that its legal basis is not reasonably available to counsel" at the time of a petitioner's procedural default, the petitioner has cause for the failure to raise the claim in accordance with the state procedural rule. Reed v. Ross, 468 U.S. 1, 16 (1984). Conversely, when the "tools to construct [a] constitutional claim" are available, then the claim is not sufficiently novel to constitute cause for failure to comply with state procedural rules because "[w]here the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default." Engle, 456 U.S. at 133-34. "[T]he question is not

whether subsequent legal developments have made counsel's task easier, but whether at the time of the default the claim was 'available' at all." Smith v. Murray, 106 S.Ct. 2661, 2667 (1986). Because we find that Adams' Caldwell claim was so novel at the time of Adams' trial in October 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time, we find that Adams has established cause for any procedural default.

The Supreme Court's decision in Furman v. Georgia, 408 U.S. 238 (1972), "drastically altered the constitutional framework in which a citizen in this country can be executed." Ford v. Strickland, 734 F.2d 538, 539 (11th Cir.), aff'd sub nom. Wainwright v. Ford, 467 U.S. 1220 (1984). In the wake of that decision, the states were

required to reevaluate and revise their death penalty statutes. Thus, in a very real sense, Furman is a watershed in Eighth Amendment jurisprudence. Furman itself, however, "engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett v. Ohio, 438 U.S. 586, 599 (1978) (plurality opinion).

Between the time Florida enacted its new death penalty statute in late 1972 in an attempt to comply with the Eighth Amendment requirements of Furman and the time of Adams' trial and sentencing, the Supreme Court had issued several decisions that began to give some shape to the Eighth Amendment concerns expressed in Furman. In Gregg v. Georgia, 428 U.S. 153 (1976), and its

companion cases,[4] the Supreme Court considered Eighth Amendment issues posed by five of the post-Furman death penalty statutes. The Court's principal concern in these cases, however, was "more with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty." Ramos, 463 U.S. at 999 (emphasis in original). Thus, Gregg "did not undertake to dictate to the State the particular substantive factors that should be deemed relevant to the capital sentencing decision," stating instead

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[4] Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

that "'the problem [of channeling jury discretion] will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.'" Ramos, 463 U.S. at 999-1000 (quoting Gregg, 428 U.S. at 192) (brackets in original) (emphasis in original).

By the time of Adams' trial, however, the Supreme Court had placed some substantive limitations on the factors that a capital sentencing jury could consider in determining whether death was appropriate:

> In Gregg itself the joint opinion suggested that excessively vague sentencing standards might lead to the arbitrary and capricious sentencing patterns condemned in Furman. 428 U.S. at 195 n. 46. Moreover, in Woodson v. North Carolina, 428 U.S. 280 (1976), the plurality concluded that a

> State must structure its capital sentencing procedure to permit consideration of the individual characteristics of the offender and his crime. This principle of individualization was extended in Lockett v. Ohio, 438 U.S. 586 (1978), where the plurality determined that "the Eighth and Fourteenth Amendments require that the sentencer [in a capital case] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Finally, in Gardner v. Florida, 430 U.S. 349 (1977), a plurality of the Court held that a death sentence may not be imposed on the basis of a presentence investigation report containing information that the defendant has had no opportunity to explain or deny.

Ramos, 463 U.S. at 1000-01 (brackets in original) (emphasis in original) (footnotes omitted). Beyond these limitations, however, the Court's Eighth Amendment jurisprudence "deferred to the

State's choice of substantive factors relevant to the penalty determination." Id. at 1001. None of these cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the Eighth Amendment prohibition against cruel and unusual punishment.

Further, critical to the Court's analysis in Caldwell is its conclusion that "[i]n the capital sentencing context there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." Caldwell, 105 S.Ct. at 2640. As discussed below, much of the Caldwell Court's rationale for this conclusion

applies with equal force to the danger of bias in favor of the death penalty from statements such as those made by the trial judge in this case. At the time of Adams' procedural default, however, Supreme Court comment on the effect that a Florida jury's awareness of its advisory role would have on its sentencing decision indicated that a diminished sense of responsibility on its part would incline it towards leniency rather than towards imposition of the death penalty. In Dobbert v. Florida, the Court rejected an ex post facto challenge to application of the new Florida death penalty statute to a crime occurring before its enactment, finding the change in the Florida law to be both procedural and ameliorative. 432 U.S. 282, 294 (1977). The Court found the petitioner's argument that the jury would have recommended life under the old death

penalty statute, as it had under the new, unpersuasive because "the jury's recommendation may have been affected by the fact that the members of the jury were not the final arbiters of life or death" and "may have chosen leniency when they knew that that decision rested ultimately on the shoulders of the trial judge, but might not have followed the same course if their vote were final." Id. at 294 & n.7.[5]

Our conclusion that Eighth Amendment jurisprudence at the time of Adams' procedural default did not provide a reasonable basis for the claim he now makes is supported by the fact that the state has not cited to, nor have we

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[5] Indeed, the dissent in Caldwell describes as "conjecture" the majority's determination that "the jury would...have 'delegated' its responsibility by erring in favor of imposing the death penalty." Caldwell, 105 S.Ct. at 2650 (Rehnquist, J., dissenting).

found, any decisions indicating that this type of Eighth Amendment claim was being raised at that time.[6] In Engle, as evidence of the reasonableness of the legal basis for raising the Mullaney issue involved in that case at the time of the petitioner's procedural default, the Court "emphasized that 'dozens of defendants relied upon [In re Winship] to

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[6] The state argues that pre-Furman cases in Florida holding that remarks by the trial judge and the prosecutor regarding appellate review constituted reversible error as a matter of state law provided a reasonable basis for Adams' Eighth Amendment claim. As we indicated in connection with our discussion of abuse of the writ, see note 2 supra, the mere fact a practice may be condemned as a matter of state law does not indicate that it also constitutes an Eighth Amendment violation. Similarly, despite the state's argument to the contrary, the Tedder decision itself clearly did not provide a reasonable basis for raising this claim, as Tedder dealt only with the weight to be given the jury's recommended sentence and not with the Eighth Amendment implications of statements that diminish the jury's sense of responsibility for its sentence.

challenge the constitutionality of rules [similar to that petitioner was challenging in Engle]'" and that numerous courts had agreed with these arguments. Reed, 468 U.S. at 19-20 (quoting Engle, 456 U.S. at 131-32). The Reed Court found the fact similar challenges were not being made and considered at the time the petitioner in Reed defaulted with regard to that same issue a "crucial respect" distinguishing the conclusion in Reed that there was no reasonable basis for raising the Mullaney issue at the time of the procedural default in Reed from the Engle Court's conclusion that a reasonable basis was present.

Id. [7]

In this case, as in Reed, claims similar to Adams' were not being raised at the time of his failure to raise this issue, despite the state's assertion that this Court's decision in this case will affect numerous cases already litigated in Florida and despite the number of Caldwell claims now being presented to this Court. As the Court noted in Engle, the fact a reasonable basis exists for a claim does not mean that every competent lawyer necessarily will raise that claim. 456 U.S. at 133-34. However, the fact no

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[7] The Reed Court did note that some authority on analogous issues did exist at the time of the petitioner's default in that case. The Court found, however, that because these cases provided only indirect support for the petitioner's claim and because they were the only cases that would have supported the claim at all, it could not conclude that they provided a reasonable basis upon which the petitioner "could have realistically appealed this conviction." 468 U.S. at 18-19.

one was raising the claim Adams now raises at the time of his trial and appeal certainly is an indication that the claim was so novel as to have no reasonable basis in existing precedent.

Because the legal basis for Adams' Caldwell claim was not reasonably available to him at the time of his trial in October 1978 and his sentencing and appeal in 1979, we find that he has established cause for his failure to raise that claim on direct appeal.[8]

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[8] In Reed, the Supreme Court recognized that "whether an attorney has a 'reasonable basis' upon which to develop a legal theory may arise in a variety of contexts" and, therefore, did not attempt to delineate those situations. 468 U.S. at 17. Instead, it confined its analysis to the specific situation presented in Reed: "one in which th[e Supreme] Court has articulated a constitutional principle that had not been previously recognized but which is held to have retroactive application." Id. In analyzing the Mullaney claim at issue in Reed, the Court discussed three situations that the Court previously had identified in the retroactivity context

as times when a new constitutional rule representing a "clear break with the past" might emerge from the Supreme Court: (1) a Supreme Court decision might overrule prior Supreme Court precedent, (2) a decision might "'overtur[n] a longstanding and widespread practice to which [the Supreme Court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved,'" and (3) a decision might "'disapprov[e] a practice th[e] Court arguably has sanctioned in prior cases.'" Id. (quoting United States v. Johnson, 457 U.S. 537, 549, 551 (1982)). The Reed Court, however, did not state that these situations were the exclusive means by which a petitioner could establish that there was no reasonable basis for his claim at the time of his procedural default. Indeed, as discussed above, the Court clearly recognized that a number of situations could give rise to "cause" based on lack of a reasonable basis for a claim.

There are significant differences between Adams' Caldwell claim and the Mullaney claim at issue in Reed which suggest that the present situation is not sufficiently like that involved in Reed to warrant an analysis in terms of the three situations discussed in Reed as constituting a "clear break with the past." The Mullaney claim at issue in Reed was a due process claim and, therefore, could be analyzed in terms of a long history of consideration by the Supreme Court as well as the lower courts. Adams' Eighth Amendment claim, however, involves an area of law that has no similar "past." The Supreme Court's decision in Furman was only six years old

at the time of Adams' trial and the statute under which he was sentenced, as well as all modern death penalty statutes, had a similarly brief history. The Reed Court's analysis of the Mullaney issue before it thus assumes a past in the form of a long decisional history that simply is not present in the Eighth Amendment context. It is in fact this lack of any past decisional history indicating that the issues raised by Adams' Caldwell claim were even addressed by the Eighth Amendment that gives rise to "cause" in this case.

Nevertheless, even assuming that our analysis should proceed in terms of the three situations outlined in Reed, the clear indication of the Eighth Amendment decisions at the time of Adams' trial and appeal that the primary concern of the Eighth Amendment was with the procedures by which the death penalty was imposed, rather than with the particular substantive factors considered by the jury in reaching its decision, and the suggestion by the Supreme Court in Dobbert that statements to a Florida jury that they were not the final arbiter of life and death would bias them in favor of leniency rather than death, certainly can be said to have "arguably sanctioned" statements such as those made by Adams' trial judge for purposes of their consistency with the requirements of the Eighth Amendment.

Further, Adams also was prejudiced by the failure to raise this claim. As discussed below, the judge's statements to Adams' jury clearly violated the principles enunciated in Caldwell, thereby creating an impermissible danger that the jury's recommended sentence was unreliable and, consequently, that Adams' death sentence was unreliable.[9]

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[9] The state argues that prejudice cannot be demonstrated because (1) the judge's comments were a correct assessment of Florida law, (2) the judge's instructions to the jury as to aggravating and mitigating factors and their weighing would make it clear the jury should render its advisory sentence on the individual circumstances of the case and (3) the comments were made during voir dire, when the judge was merely trying to give the prospective jurors some sense of the sentencing structure.

As discussed above, however, the judge's comments were misleading because they left the jury with a false impression as to the significance of its role in the sentencing process. Further, the judge's instructions regarding mitigating and aggravating circumstances did not cure the misleading statements, because there was no withdrawal or

With the above modification of the previously published opinion, the Petition for Rehearing is DENIED.

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correction of those statements. Cf. Caldwell, 105 S.Ct. at 2645 n. 7 (prosecutor's later statements that jury played important role did not cure misleading statements because prosecutor did not retract or undermine those statements). Although the trial judge instructed the jury during the penalty phase not to "act hastily or without due regard to the gravity of these proceedings" and told it to "carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake," nothing he said corrected the misunderstanding as to the significance of the jury's recommendation engendered by his earlier statements. In fact, at the beginning of the penalty phase, the judge reinforced his prior comments by stating that "the final decision as to what punishment shall be imposed rests solely upon the Judge of this Court." He also made a similar remark at the beginning of the penalty phase jury instructions. Further, the fact the jury heard these statements during voir dire does not mean that the statements did not influence the jury. These statements were not isolated, insignificant comments. They were made by the judge at a time when he purportedly was informing the prospective jurors as to their role in the trial, the statements were made repeatedly, and the judge informed the prospective jurors that the substance of these statements

was "the most important thing to remember in Phase Two."

THIS IS A CAPITAL CASE
EXECUTION IS SCHEDULED FOR
THURSDAY, AUGUST 11, 1983

Prisoner's Name: ALVIN R. MOORE, JR.

Prison Number: 97556

Place of Confinement:
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF LOUISIANA

SHREVEPORT DIVISION

ALVIN R. MOORE, JR.,
Petitioner,
v.
ROSS MAGGIO, Warden, Louisiana State Penitentiary, Angola, and the ATTORNEY GENERAL OF THE STATE OF LOUISIANA,
Respondents.

PETITION FOR WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY

To the Honorable Tom Stagg, United States District Judge for the Western District of Louisiana, Shreveport Division:

GROUND II

Petitioner's death sentence was unconstitutionally imposed in violation of the Eighth and Fourteenth Amendments to the United States Constitution as the result of the Louisiana Supreme Court's failure to engage in a meaningful excessiveness review designed to assure that death is the appropriate sentence.

88. The Supreme Court of the United States has upheld the constitutionality of capital punishment statutes "on their faces" only upon the assumption that they provided for meaningful and effective appellate review that would function adequately to prevent arbitrariness in capital sentencing, including review procedures through which a state supreme court could compare each captial case with other cases to determine whether the sentence in the case under consideration was excessive or disproportionate to that administered in other similar cases. Gregg v. Georgia, 428 U.S. 153, 166-67

(1976).

89. The excessiveness review engaged in by the Louisiana Supreme Court on the direct appeal from petitioner's conviction and sentence of death falls far short of the type of review mandated by the Eighth and Fourteenth Amendments. Pursuant to La.C.Cr.P., Art. 905.9 and Supreme Court Rule 28, the Court is required to review the death sentence to determine whether it is excessive in light of the following factors:

(1) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors;

(2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and

(3) whether the sentence is

> disproprotionate to the penalty imposed in similar cases.

The Court's consideration of each of these factors is superficial at best. In addition, the Court fails to conduct its review of each individual factor in light of the others in determining whether death is excessive. The result is a constitutionally ineffective excessiveness review in no way designed to assure reliability in sentencing determinations.

1. Passion, prejudice or other arbitrary factors.

90. The Court determined that petitioner's death sentence was not imposed as the result of passion, prejudice or any other arbitrary

factor. This conclusion was based on two findings: (1) that the prosecution's references to appellate review of the jury's sentence, "although close to reversible error, did not induce the jury to believe that its responsibility was lessened by appellate review," and (2) the jury was not influenced by prejudice since there was "no reference at any point in the record to color, or appeal to racial prejudice." State v. Moore, 414 So.2d at 347. In making these findings, the Court utterly fails to appreciate the risk that the decision to vote for death was influenced by the reference to appellate review or racial prejudice.

91. At the sentencing phase of petitioner's trial, the prosecution concluded his closing argument to the jury as follows:

...there is only one penalty

> really available for this type crime and that is the death penalty. This is where it will begin. From the next point forward it goes through the court system to be thoroughly reviewed and checked, through every court in this land. But it has to begin here, right here with the jury. And it's not an easy thing to ask for and it's not an easy thing for you to give. But if we are going to stop this type of useless and senseless violence against people there is only one way to stop it, and that's right here. Thank you. [R. at 766, emphasis added.]

Immediately thereafter, the defense attorney gave his brief closing statement in which he concluded in like manner:

> The mistake can be corrected, no doubt, but I ask you to give it your most serious consideration in the next short length of time, and determine that the death penalty would not be proper in this case. Thank you. [R. at 776, emphasis added.]

In his charge to the jury on the law, the judge made no statement to the jury that these remarks should be disregarded or

or that the prosecutor's reference to a review of the jury's sentence by "every court in this land" was misleading and inaccurate.

92. In its recent decision in California v. Ramos, 33 Cr.L. 3306 (U.S., July 6, 1983), the United States Supreme Court recognized the risks inherent in a procedure whereby the jury is informed of the extent of the review of its sentencing decision. As the Court stated:

> Advising jurors that a death verdict is theoretically modifiable, and thus not "final," may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencer.

Ramos, 33 Cr.L. at 3312. The statements made by the prosecutor and reinforced by defense counsel regarding the extent of review of the jury's sentencing decision

are just the sort of statements that have the effect of inducing the jurors to disregard the seriousness of their responsibility. With the insertion of these statements in the sentencing proceeding, an unacceptable risk was created that death would be imposed arbitrarily and capriciously. The imposition of petitioner's death sentence in the face of this risk is not constitutionally acceptable. Lockett v. Ohio, 438 U.S. 586, 605 (1978) (Burger, C.J.); Gregg v. Georgia, 428 U.S. 153, 188, 206-07 (1976) (plurality opinion); see also, State v. Willie, 410 So.2d 1019, 1035 (La. 1982). The Court's failure to appreciate this risk rendered its excessiveness review meaningless.

C E R T I F I C A T E

I CERTIFY that a copy of the foregoing Petition for a Writ of Habeas Corpus by a Person in State Custody, Motion for Stay of Execution, and Memorandum in Support was sent by certified mail to Mr. Ross Maggio, Warden, Louisiana State Penitentiary at Angola, Louisiana, and Honorable William J. Guste, Attorney General of the State of Louisiana, P.O. Box 44005, Baton Rouge, Louisiana 70821, on this ____ day of August, 1983.

_____
WELLBORN JACK, JR.

IN THE

SUPREME COURT

OF

THE UNITED STATES

OCTOBER TERM, 1983

NO.

BOBBY CALDWELL,

Petitioner,

- against -

THE STATE OF MISSISSIPPI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MISSISSIPPI SUPREME COURT

E. THOMAS BOYLE, P.C.
Attorney for Petitioner
27 West Main Street
P.O. Box 846
Smithtown, New York 11787
(516) 265-1166

April 19, 1984

REASONS FOR GRANTING THE WRIT

I. THE PROSECUTOR'S ARGUMENT THAT THE JURY'S IMPOSITION OF THE DEATH PENALTY IS NON-FINAL AND SUBJECT TO APPELLATE REVIEW UNCONSTITUTIONALLY DIMINISHED THE JURY'S RESPONSIBILITY TO IMPOSE AN INDIVUALIZED SENTENCE IN A CAPITAL CASE

This case presents an issue that the Court has never determined: the constitutional limits of prosecutorial argument aimed at lessening the jury's responsibility in returning a sentence of death. The prosecutor argued - and the trial court condoned - comments that the jury's determination imposing the death penalty was "not the final decision" and was "automatically reviewable" by the State's highest court.*

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* A similar argument was made by the prosecutor in Maggio v. Williams, U.S. , 104 S.Ct. 311 (1983), however defense counsel there failed to object and the Court refused to consider the error on habeas corpus review. In a concurring opinion however, Justice Stephens addressed the merits of the issue and stated:

While the Mississippi Supreme Court split 4-4 on this issue, all 8 of the judges agreed that under Ramos v. California, U.S. , 103 S.Ct. 3446 (1983), this issue was void of constitutional overtones and therefore should be decided strictly as a matter of state law.

California v. Ramos, U.S. , 103 S.Ct. 3446 (1983) involved the constitutionality of instructions to the jury at the sentence phase that apprised

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In my opinion, the argument was prejudicial to the accused, both because it appears to have misstated the law and because it may have led the jury to discount its grave responsibility in determining the defendant's fate. A prosecutor should never invite a jury to err because the error may be corrected on appeal. That is especially true when the death penalty is at stake. Maggio v. Williams, supra, U.S. , 104 S.Ct. at 316 (concurring opinion, Justice Stephens).

the jury that the defendant was subject to parole in the event that life imprisonment was imposed. The Court held that this was accurate information which enabled the jury to fullfill its obligation in meting out the appropriate life or death sentence.

In sharp contrast to the instructions in Ramos, the comments here, as noted in the dissenting opinion of Judge Lee, had the effect of "lessening a juror's sense of responsibility for the fate of the accused":

> Those jurors who are not convinced that a defendant's life should be taken, may not argue so strongly or hold their position when they are led to believe that a reviewing court will correct a mistake in their judgment. Dissenting opinion at 2, annexed as Exhibit "A".

The prosecutor here advised the members of the jury that they were not the ones responsible for the defendant's

death, when in fact they were:

> Now, they [defense counsel] would have you believe that you're going to kill this man and they know -- they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it.

When defense counsel timely objected, the prosecutor retorted:

> Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

Instead of curing this flagrant error by proper cautionary instructions, the trial court condoned the prosecutor's comments:

> All right, go on and make the full expression so the jury will not be confused. I think it is proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the jury so they will not be confused.

The prosecutor then made his "full expression" that the jury's determinaton was not "the final decision" and was subject to automatic review by the State's highest court:

> [Defense counsel]: insinuat[ed] that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of the Courthouse in moments and string him up and that is terribly unfair. For they know, as I know, and as Judge Baker has told you, that that decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so (681).

The issue here is far different from attempting to predict individual future behavior, as in Ramos. This Court held that there was no diminishment of the jury's responsibility for its verdict in Ramos, but rather, a fostering of such responsibility by providing the jury with the information needed to mete out the appropriate sentence.

Here, just the converse is true. Advising a jury that a death sentence is non-final and subject to appellate review is deceptive* and detracts from the jury's overall responsibility for its decision. These comments divert the jury from "undertaking the kind of indi-

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* By statute, the Mississippi Supreme Court's review of the jury's determination of death is limited to:

> (a) whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance...and
>
> (c) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Mississippi Code 1972 Ann. § 99-19-105 (1983 Supp.)

As Judge Lee noted in his dissenting opinion:

> Even a novice attorney knows that appellate courts do not impose a death penalty, they merely review the jury's decision and that review is with a presumption of correctness. Dissenting opinion at 3, annexed hereto as "A".

vidualized sentencing determination that under Woodson v. North Carolina, 428 U.S. at 304, is a 'constitutionally indispensable part of the process of inflicting the penalty of death'", California v. Ramos, supra, U.S. at , 103 S.Ct. at .

This Court, in Ramos, acknowledged the problems caused by remarks to a jury that conveyed the impression to the jury that its determination was not "final":

> In fact, advising jurors that a death verdict is theoretically modifiable, and thus not "final" may incline them to approach their sentencing decision with less appreciation for the gravity of their choice and for the moral responsibility reposed in them as sentencers.
>
> California v. Ramos, supra, U.S. at 103 S.Ct. at (O'Connor, J.) (1983)

Individualized sentencing by the jury in capital cases is essential to the constitutionality of a statutory

scheme. Gregg v. Georgia, 428 U.S. 153, 206 (1976); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Zant v. Stephens, U.S. , 51 U.S.L.W. 4891 (1983); Proffitt v. Florida, 428 U.S. 242, 251-252 (1976); Woodson v. North Carolina, 428 U.S. 280, 304-306 (1976); Roberts v. Louisiana, 431 U.S. 633 (1977). Advising the jury that the sentence is non-final and subject to appellate review unconstitutionally detracts from the jury's responsibility to impose such a sentence.

The State below noted in its brief in the Mississippi Supreme Court that this"issue is far too vital to be left to purely procedural handling" and that the issue is one "of common appearance in recent capital cases" in the State of Mississippi. Appellee's Supplemental Brief at 1. Defense counsel made timely objection. .The mere fact that it was not

included in the assignments of error, should not preclude the Court from addressing such a critical issue in a death case. Moreover, the issue was briefed by both parties below prior to the decision by the Supreme Court of Mississippi. Accordingly, it is properly preserved for review. Because this issue frequently arises in captial cases it should be reviewed by this Court.

The majority's statment below that defense summation invited the prosecutorial response is without merit. Defense counsel argued the only two sentencing alternatives available to his client under the Mississippi statutory scheme*. As the dissent stated

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* Mississippi Code § 99-19-101 in relevant part provides:

> (1) Upon conviction or adjudication of guilt of a defendant of captial murder .... the court shall conduct a separate sentencing

below "[t]he fact that appellate review is mandated is irrelevant to the thought processes required to find that an accused should be denied mercy and sentenced to die". Dissenting opinion at 4, annexed hereto as Exhibit "A". Defense counsel's plea for petitioner's life did not invite the comment in question.

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proceeding to determine whether the defendant should be sentenced to death or life imprisonment.

No. 83-6607

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

Bobby Caldwell,

Petitioner,

v.

The State of Mississippi,

Respondent.

REPLY BRIEF

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POINT I

THE PROSECUTOR'S REMARKS CONCERNING THE NON-FINALITY OF THE JURY'S VERDICT AND APPELLATE REVIEW CONSTITUTE CONSTITUTIONAL ERROR AND REQUIRE A NEW TRIAL. [In Reply To Point A Of Respondent's Brief]

1. No Adequate Independent State Ground.

Respondent argues at 18-23 of its brief that the Court is without jurisdiction to consider Point I of petitioner's brief because it rests on an adequate and independent state ground, i.e, the failure by petitioner's assigned appellate counsel below to assign this claim as error in the Mississippi Supreme Court pursuant to Rule 6(B).[1]

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[1] The Mississippi Supreme Court has described its Rule 6(B) as a "general rule" that "no error not assigned may be urged as grounds for reversal." Read v. State, 430 So.2d 832, 838 (1983). It reads as follows:

> No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

Respondent's contention is devoid of merit.

Although outside of the record, respondent maintains that the issue of the "non-final" and "reviewable" comments was raised "by one of the Justices of the State Supreme Court sua sponte during oral arguments." Respondent's brief at 18. Petitioner's counsel has been informed by Cleveland McDowell, Esq., petitioner's assigned appellate counsel in the Mississippi Supreme Court, that he [McDowell] received a phone call from the administrative clerk of the Mississippi Supreme Court prior to oral argument,

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The Mississippi Supreme Court has further noted with respect to this provision:

> This rule gives this Court the option to raise 'plain error' not assigned when it deems proper and is not for the purpose of allowing counsel to argue questions not raised by the assignment of error. Prueitt v. State, 261 So.2d 119, 125 (Miss. 1972).

advising him that the court would like him to address that issue at oral argument, even though it had not been briefed or assigned as error. Mr. McDowell advises that both sides did so at oral argument and supplemented this by filing post-argument briefs addressed to the issue. The post-argument briefs are part of the record below. It is clear under both versions that the Mississippi Supreme Court sua sponte requested the parties to address the issue, and that this was done at the oral argument and supplemented by written briefs which the Court considered prior to rendering its decision. It was also addressed by both parties in the petitioner's application for rehearing.

Whether the decision below rests on an adequate independent state ground is itself a federal question:

> A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. Henry v. Mississippi, 379 U.S. 443, 447 (1965) (Brennan, J.)

In James v. Kentucky, U.S. ___, 104 S.Ct. 1830 (1984), the court held that defense counsel's request for an "admonition" that no adverse inference be drawn from the defendant's failure to tesify when, according to state law, he should have requested an "instruction," was not an adequate basis under state law to deny the accused his constitutional right to such a charge. In that case, as here, the alleged "fatal procedural default" is "not the sort of firmly established and regularly followed state practice that can prevent imple-

mentation of federal constitutional rights" Id. at 1835.

Respondent cites the Court to no case where an issue briefed and argued in the Mississippi Supreme Court was denied recognition because it was not assigned as error pursuant to Rule 6(B). Moreover, in a case decided subsequent to petitioner's, the Court reversed on the merits for the very reason stated by the dissent herein, even though defense counsel had failed to make any objection at trial. Williams v. State, 445 So.2d 798 (Miss. 1984).

The rule exists for the benefit of the Mississippi Supreme Court which promulgated it. That court in this case waived the rule when it sua sponte raised the issue and requested the parties to address it on the merits. Both parties were afforded ample opportunity to address the merits of the issue and did

so. The court addressed the merits of the issue and it was the sole basis for the 4-4 split. Neither the court below nor respondent can claim that it was prejudiced by appellate counsel's omission. It serves "no perceivable state interest" to permit the State to invoke this rule to preclude review for lack of jurisdiction. As in James v. Kentucky, supra, this is not a case of a "defendant attempting to circumvent" a state procedural rule. Nor does the respondent claim that such is the case.

In Henry v. Mississippi, supra, the court noted that matters of trial strategy and tactics by defense counsel, even though without consultation with the accused, would bar direct federal reivew (sic) of claims thereby foregone. Henry v. Mississippi, supra, 379 U.S. at 451, 85 S.Ct. at 569. See also, Wainwright v. Sykes, 433 U.S. 89, 97 S.Ct. 2497

(1977). Clearly strategy and tactics are not involved here. Accordingly, the failure of petitioner's assigned appellate counsel below should not be imputed to the petitioner.

The Court recently addressed a similar issue in Evitts v. Lucey, U.S. ___, 53 U.S.L.W. 4101 (decided January 21, 1985). The Court there held that an accused has the Sixth Amendment right to the effective assistance of counsel in a non-discretionary state appeal. The failure to file a "statement of appeal" as a preliminary step in the state appellate process there could not bar consideration of the appeal on the merits. That situation is similar to the default on which respondent seeks to rely. Petitioner's appellate counsel failed to claim this issue as error in his assignment of errors filed at the outset of the appellate process. By this

omission counsel violated petitioner's right to effective assistance of counsel. As in Evitts, this procedural default may not bar consideration of the merits of the issue.

Petitioner has been sentenced to death, which "requires a correspondingly greater degree of scrutiny" of the record, California v. Ramos, U.S. ___, 103 S.Ct. 3446, 3451 n. 9, and notice of error not properly raised below. Edding v. Oklahoma, 455 U.S. 104, 113-114 n. 9 (1981). Accordingly, the Court should address the merits of the federal constitutional claim.

2. Petitioner Should Prevail On The Merits.[2]

Respondent does not seek to sustain

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[2] Respondent at 15 acknowledges that the decision below on the merits rests on a "substantive constitutional" ground.

the judgment below for the reasons stated by the Mississippi Supreme Court, i.e, that defense counsel invited error by reference to (1) imprisonment for the rest of petitioner's life [discussed in Petitioner's brief at 31] and (2) pleading for forgiveness[3] [discussed at Petitioner's brief at 32]. Abandoning those grounds, the State argues that defense counsel's summation attempted "to advise the jury that the defendant would upon the return of their verdict literally be taken out the back door of the Courthouse and there executed." Respondent's brief at 29-30. Ironically, the respondent bolsters this argument

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[3] The Court has recognized that in a death case it is constitutionally permissible for a jury" to dispense mercy on the basis of factors too intangible to write into a statute." Gregg v. Georgia, 428 U.S. 153, 222, 96 S.Ct. 2909, 2947 (1976) (White, J., concurring in judgment). See also, Lockett v. Ohio, 438 U.S. 586 (1978).

with the contradictory contention that "virtually every person of age eligible for jury service knows that death penalties are reviewable on appeal." Respondent's brief at 31. Both claims are without merit.

The record does not support respondent's first contention. This basis for invited error was never mentioned in the opinion of the four judges below who sustained the sentence, nor by the four judges who dissented. Respondent does not cite the Court to any particular part of the defense counsel's summation (J.A. 16-21) to substantiate this contention. It appears that this claim was merely a straw man set up by the prosecutor,[4] Mr. Williams, to enable

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[4] The prosecutor stated at the outset of argument:

> I'm in complete disagreement with the approach the defense has taken. I

him to get in the challenged remarks.

Mr. Williams, the prosecutor below, used the same tactics in Wiley v. State, 449 So.2d 756 (Miss. 1984)--decided after petitioner's case. Mr. Williams' argument in Wiley has a familiar ring:

> He [defense counsel] tells you . . . that the State wants to kill a man and that you'll have to live with this the rest of your life. He's attempting to put you in the role of hangman. It's unfair. It's totally unfair. He knows just as well, like I know and every other person that's familiar with the Court system, that any decision you render is automaticaly reviewable. Wiley v. State, supra, 449 So.2d at 761.

> don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . . (J.a. 21).

The Mississippi Supreme Court reversed Wiley's sentence, stating:

> The role of juror in a capital murder trial brings with it an awesome responsibility. Fortunately, few of us are ever required to make the decision whether to end another human being's life; however, that is precisely the question confronting jurors following a guilty verdict in a capital case. Such decision is so ominous that it becomes almost trite to attempt to assess the introspection, concern, and solemnity that accompany it.
>
> Because of the importance of the jurors' deliberations we must be cautious in avoiding any actions which tend to reduce the jurors' sense of responsibility for their decision. They must not be permitted to look down the road for someone to pass the buck to. Arguments by a prosecutor which relate to reviewability of a jury's verdict have exactly this dangerous effect. Jurors faced with the portentous duty of deciding an accused's fate will take comfort in the fact of review. They may view their role as merely advisory, a view that can prove fatal to an accused.
>
> Under our law the jury is the sole player in the judicial process who may vote to send an accused to die. They alone make

> that determination and all review is then conducted with a presumption of its correctness. While a jury is not literally 'the hangman,' only they may supply the hangman's victims. All notions of justice require that the jurors as individuals, and as a body, recognize and appreciate the gravity of their role. Id. at 762.

Respondent's reliance on Donnelly v. DeChristoforo, 416 U.S. 637 (1974), is misplaced. There the trial court gave the jury immediate admonishment to disregard the prosecutor's improper comments on summation. Moreover, in his final charge to the jury the court specifically addressed the prosecutor's improper comments and again cautioned that the remark was unsupported and must be ignored in their deliberations. By contrast, here the court never gave a curative instruction. What is worse, upon timely defense objection, the trial judge here condoned the error and encouraged the prosecution to further

pursue the improper line of argument, which the prosecutor then did ["insinuating that your decision is the final decision" (J.A. 22)].

The respondent states that Corn v. Zant, 708 F.2d 549 (11th Cir. 1983) and Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) "appear to be dispositive of the issue." Respondent's brief at 30-31. If indeed these cases are "dispositive," it is in favor of the petitioner, not the respondent. In Corn v. Zant, supra, there was no defense objection and the issue arose when the Court understandably misinterpreted a question from the jury during deliberations. The jury asked, "[i]f the death penalty is invoked, does that automatically mean that the defendant will be placed in the electric chair?" Id. at 556. The Court answered that the law provides for a mandatory appeal in a death sentence case. Ibid.

The jury then immediately asked what it had really intended, i.e., whether the judge could change the sentence, and the court instructed the jury that he could not. The jury there was left with the distinct belief that they were the final and sole determiners of the sentence. The prosecutor never argued reviewability to diminish the jurors' responsibility for imposition of the sentence.

The Court in Corn concluded that the remarks could "not be construed as encouraging the jury to attach diminished consequences to the verdict." Id. at 556. While indicating that the particular circumstances involved no constitutional deprivation, the Court of Appeals cautioned that "a reference to automatic appeal of the death penalty in a different context might have resulted in fundamental unfairness." Id. at 557. The Court of Appeals referred to Prevatte

v. State, 233 Ga. 929, 214 S.E.2d 365, 367 (1975), where the Georgia Supreme Court held that the "inevitable effect" of the prosecutor's emphasis in summation on defendant's right of automatic appeal is "to encourage the jury to attach diminished consequences to their verdict." Such is the case here.

Respondent's reliance on Moore v. Zant, 722 F.2d 640 (11th Cir. 1983) is also puzzling. The court there specifically admonished the jury in his charge to disregard the prosecutor's reference to automatic sentence review. Id. at 648. The Court held that the improper comments under such circumstances did not render the trial fundamentally unfair. Here the trial judge condoned the remarks.

Contrary to respondent's claim at 33 of his brief, the Court did not dispose of this issue in Maggio v. Williams, U.S.

___, 104 S.Ct. 311 (1983). Maggio involved a decision on a motion to vacate a stay of execution issued by the Court of Appeals. The Court noted that it had denied certiorari twice in the very same case, and accordingly held that the applicable standard[5] for issuance of a stay had not been met. It is too obvious to require citation that denial of certiorari is not precedent with respect to the merits[6] of the issues raised.

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[5] A "reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the granting of certiorari . . . " Id. at 311.

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[6] Three Justices of the Court, however, by separate opinion, indicated concern that a prosecutor's argument concerning mandatory review of the death sentence was misleading and tended to diminish overall responsibility for imposition of the sentence. See concurring opinion of Justice Stephens and dissenting opinion of Justice Brennan, joined in by Justice Marshall. Maggio v. Williams, supra, ___ U.S. at ____, 104 S.Ct. at 315, 316 et. seq.

It is important to note that the case here is not one which simply refers to the fact of appellate review. The reference was made by the prosecutor, together with the misleading statement that the jury's determination "is not the final decision." Clearly, the intent and effect of this argument was to lessen the juror's responsibility for a decision which rested exclusively on them under Mississippi law. Respondent's reference to State v. Berry, 391 So.2d 406 (La. 1980) is well taken:

> Any prosecutor who refers to appellate review of the death sentence treads dangerously in the area of reversible error. If the reference conveys the message that the juror's awesome responsibility is lessened by the fact that their decision is not the final one, or if the reference contains inaccurate or misleading information, then the defendant has not had a fair trial in the sentence phase, and the penalty should be vacated. Id. at 418.

The law in Mississippi, pursuant to Williams v. State, 445 So.2d 798 (Miss. 1984) and Wiley v. State, supra -- decided after petitioner's case -- is that reference to right of review is prejudicial error requiring a new capital sentencing trial, even in the absence of a contemporaneous objection by defense counsel at trial. It is solely by virtue of the recusal of a single justice in petitioner's case that the same result was not reached below.

It cannot be said that this error of constitutional dimension did not affect the jury's deliberations. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967). The judgment below should be vacated and remanded for a new trial.